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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 152

J. GREENEBAUM TANNING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari

To The
United States Circuit Court of Appeals for the Seventh Circuit

JOHN L. McINERNEY,
One N. LaSalle Street, Chicago, Ill.,

LEON B. LAMFROM,
Bankers Building, Milwaukee, Wis.,

EGON W. PECK,
Bankers Building, Milwaukee, Wis.,

Attorneys for Petitioner,
J. Greenebaum Tanning Company.

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No. .....

J. GREENEBAUM TANNING COMPANY,

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vs.

NATIONAL LABOR RELATIONS BOARD,

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Petition for a Writ of Certiorari

To The

United States Circuit Court of Appeals for the Seventh Circuit

J. Greenebaum Tanning Company prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on April 27, 1940, enforcing an order of the National Labor Relations Board.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 626-635), dated March 22, 1940, is reported in 110 F. 2d 984,

National Labor Relations Board vs. J. Greenebaum Tanning Company. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 589) are reported in 11 N. L. R. B. No. 29, page 300, Case No. C-864, decided February 15, 1939, *In the Matter of J. Greenebaum Tanning Company (Chicago, Illinois) and National Leather Workers Association, Local No. 43, affiliated with the C. I. O.*

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on April 27, 1940 (R. 645-647). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A. Sec. 347) as amended by the Act of February 13, 1925, and Sections 10 (e) and (f) of the National Labor Relations Act, Title 29 U. S. C. A., Section 160.

QUESTIONS PRESENTED.

1. Whether the court below erred in enforcing the order of the Board as modified by the court, when the order was based upon no substantial evidence that petitioner had committed any unfair labor practices within the meaning of the National Labor Relations Act.

2. Whether the Board and the court below had the power and jurisdiction to order the reinstatement of Wojdyla, Zych, and Froelich, former employees, in the absence of findings or evidence that between May 27, 1937, when they were discharged, and February 15, 1939, when the Board made and entered its findings and order, they had not "obtained any other regular and substantially equivalent employment."

3. Whether the Board and the court below had jurisdiction and power to order the payment of back pay to

Wojdyla, Zych, and Froelich, in the absence of findings or evidence upon which a reinstatement order could be based.

4. Whether the Board and the court below, having ordered deduction from back pay of amounts paid to Wojdyla, Zych, and Froelich for services actually performed by them on governmental work-relief projects, had the jurisdiction and power to order petitioner, as it did, to reimburse such governmental work-relief projects for the money paid by them for said services.

5. Whether the court below erred in not limiting the scope of the order to the Chicago plants of petitioner and the employees employed in the Chicago plants.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act (herein referred to as the "Act") are printed in the appendix to this petition.

STATEMENT.

Petitioner is an Illinois corporation with its principal office and place of business in the City of Chicago, State of Illinois. It is engaged in the tanning business and converts raw hides into leather. It owns and operates two plants in the City of Chicago, which are immediately adjacent to each other and are integrated units, and operates plants in the City of Milwaukee, State of Wisconsin (R. 18, 592).

The Labor Board proceeding here involved related only to petitioner's Chicago plants (R. 7-9, 592). Petitioner, in this proceeding, seeks review of an order of the Circuit Court of Appeals for the Seventh Circuit enforcing, with a modification not here material, an order of the National

Labor Relations Board, the details of which are hereinafter discussed.

A — Procedural Facts.

Amended charges (R. 10-11) having been filed by National Leather Workers Association, Local No. 43, the Board issued its complaint against petitioner on February 8, 1939 (R. 7-10).

The complaint, as amended, alleged among other things that petitioner, on or about May 13, 1937, dominated and interfered with the formation of Rockwell-Warsaw Leather Workers Association (herein referred to as the Association), and thereafter dominated and interfered with its administration and contributed financial and other support to it; that petitioner, on or about May 27, 1937, discharged Cyril Wojdyla, Andrew Zych, and John Froelich, and thereafter refused to reemploy them because they refused to join the Association and, that by said acts petitioner engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the National Labor Relations Act (R. 7-9, 12).

On February 15, 1938, petitioner filed its answer, in which it denied that it had committed the unfair labor practices alleged in the complaint (R. 14-17).

Pursuant to notice, a hearing was held in Chicago, Illinois, on February 18, 19, 21, 22, and 24, 1938, before the Trial Examiner designated by the Board (R. 20-533).

On May 27, 1938, the Trial Examiner filed its Intermediate Report in which he found that petitioner had engaged in the unfair labor practices alleged in the complaint and recommended that petitioner cease and desist from such practices and take certain affirmative action (R. 565-573). Exceptions were filed to this Intermediate Report (R. 573-583). On February 15, 1939, the Board rendered

its decision setting forth its findings of fact, conclusions of law, and order (R. 589-611).

Briefly summarized, the Board's findings of fact found that petitioner dominated and interfered with the formation and administration of Rockwell-Warsaw Leather Workers Association and contributed financial and other support to it (R. 595-604); discriminated in regard to the hire and tenure of employment of Wojdyla, Zych and Froelich (R. 604-607); and, by these acts interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 604-607). Upon these findings, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act (R. 609).

The Board's order required petitioner to *cease and desist* from: dominating or interfering with the administration of Rockwell-Warsaw Leather Workers Association, the formation or administration of any other labor organization of "its employees," contributing financial or other support to Rockwell-Warsaw Leather Workers Association or any other labor organization of "its employees," discouraging membership in National Leather Workers Association Local No. 43 or any other labor organization of "its employees," giving effect to the agreement of May 26, 1937 with Rockwell-Warsaw Leather Workers Association or any renewal thereof, and in any manner interfering with, restraining, or coercing "its employees" in the exercise of the rights guaranteed to them by Section 7 of the Act.

The order also *affirmatively* required petitioner to: withdraw all recognition from Rockwell-Warsaw Leather Workers Association and disestablish it, offer reinstatement to Cyril Wojdyla, Andrew Zych and John Froelich, make them whole for any loss of pay sustained by them by reason of their discharge, pay to fiscal agencies of gov-

ernment work-relief projects amounts paid by them to said Wojdyla, Zych or Froelich for services actually performed by them on such work-relief projects, reimburse all employees for dues deducted from their wages for the benefit of Rockwell-Warsaw Leather Workers Association, and post notices and notify the Regional Director of steps taken to comply with the order (R. 609-611).

On June 24, 1939, the Board, pursuant to Section 10 (e) of the Act, filed in the court below its petition for enforcement of its order of February 15, 1939 (R. 1-4). On July 14, 1939, petitioner filed its answer to the Board's said petition, challenging the findings, conclusions and order of the Board (R. 5-6).

On March 22, 1940, the court handed down an opinion holding that the Board's findings of fact were supported by evidence and sustaining the Board's order, except insofar as it ordered the petitioner to reimburse its employees for any dues which it had deducted from their wages on behalf of Rockwell-Warsaw Leather Workers Association (R. 626-635).

On April 16, 1940, petitioner filed its "Objections to Entry of Any Decree at This Time" and "Objections to the Entry of a Decree in the Form Proposed by the National Labor Relations Board" (R. 637-641).

On April 27, 1940, the court below entered an order overruling the objections of the petitioner (R. 644), and on the same day entered its decree enforcing the order of the Board excepting as to the reimbursement to employees of dues deducted in behalf of Rockwell-Warsaw Leather Workers Association (R. 645-647). On May 7, 1940, it modified its decree as to one provision not material here (R. 647).

B — Evidential Facts.

Organization of Rockwell-Warsaw Leather Workers Association.

In 1934, prior to the enactment of the National Labor Relations Act, an organization of the employees of the Chicago plants, known as the Employees Benefit Association (referred to as the "E. B. A."), was formed (R. 298).

The E. B. A. had for its purpose "collective bargaining with the company, with a sick benefit attached" (R. 298). Each member paid five cents per week dues, and petitioner made a similar five cents per week contribution for each member to enable the E. B. A. to pay sick benefits which it had established (R. 302). The dues and contributions were paid into the general funds of the E. B. A. (R. 303). Through negotiations with petitioner, the E. B. A. procured various wage increases and improved working conditions for the employees (R. 367-368); and, its Shop Chairman, Roy Breen, had the freedom of the plant (R. 367).

Shortly after this Court had sustained the constitutionality of the National Labor Relations Act in April 1937, the Shop Chairman of the E. B. A. (Roy Breen), and its President (Jack Nunsek), were called to the office of Kurt Friend, an officer of petitioner, and told by Mr. Friend that petitioner could and would no longer recognize the E. B. A. because of the Wagner Act (R. 302, 380, 381, 384).

The court below in its opinion refers to the fact that during this conference, Mr. Friend told Breen and Nunsek that the employees " 'would have to form a new' organization and 'quit the old one' " (R. 627). This statement apparently was predicated on the following portion of Breen's testimony concerning this conversation with Mr. Friend:

"A. Well, we got a report from our lawyer that it (the E. B. A.) was against the Wagner Law.

* * * * * * *

"Q. What was the nature of the information he gave you that day with reference to that?

"A. Well, I guess the firm told me about it, that we would have to form a new one and quit the old one" (R. 302).

The court below apparently, as did the Board, however, entirely disregarded Breen's further testimony as follows:

"Q. Did anybody connected with the Greenebaum Tanning Company ever ask you to form a union and tell you what they wanted and not to have C. I. O. and not to have American Federation of Labor but to have one of your own that you could run? Did anybody ever tell you anything like that?

"A. Never.

"Q. And when they advised you that the old association could not be continued was it because they said that they could not any longer aid any organization of employes under the Wagner Act?

"A. They could not match our nickel.

"Q. They couldn't give you any more support?

"A. That is right.

"Q. Did they then say to you that it was immaterial to them whether you affiliated with any labor organization or whether you organized independently, that it meant nothing to them one way or the other, did they say that to you?

"A. They told me they would recognize fifty-one per cent no matter who has got it" (R. 381).

After the E. B. A. had thus been notified by petitioner that it would no longer recognize the E. B. A., the officers of the E. B. A. took the matter up with its attorney, Frank Moland, and they were advised by him that because of petitioner's contributions to the sick fund the E. B. A. was contrary to the Wagner Act (R. 302, 384), and thereafter Breen had notices printed announcing a mass meeting to be held on the night of May 13, 1937 "concerning the Wagner Law" (Bd. Exh. 7). On May 11, 12 and 13, 1937, Breen distributed these leaflets among the employees during working hours. This required very little of Breen's time; he nevertheless got out a full day's work, and no foreman saw him distribute the leaflets (R. 173, 312-314).

The May 13th, 1937 mass meeting was held as scheduled in Central Park Hall. It was open to all the Chicago employees of petitioner, and only non-employees were excluded from this meeting (R. 274-275).

The court below, in its opinion, stated: "Representatives from the Union, the National Leather Workers Association, Local No. 43, who sought an opportunity to present arguments in favor of affiliation with the Union, were removed from the meeting by policemen, and several of the representatives were arrested" (R. 628). It was definitely established, however, that it was only non-employees who were ejected, and that they were ejected upon the order of the *employees* in charge of the meeting (R. 274-275).

There was no evidence or any finding to the effect that petitioner had anything to do with either the calling of the May 13th meeting or the conduct thereof, or even knew that a meeting had been called.

Approximately 300 to 325 employees attended this meeting (R. 397). The meeting was addressed by the attorney for the E. B. A. and by another attorney who spoke Polish for the benefit of the Polish employees. The speakers outlined the provisions of the National Labor Relations Act,

and stated that in their opinion the E. B. A. was illegal. They also informed the employees that they "could join the C. I. O. or A. F. L. or independent" and that the employees had the "power and right to join whatever" they wanted to join (R. 393-394).

The court below, in its opinion, in referring to the action taken at this meeting stated "no action was taken to dissolve the old Benefit Association" (R. 628). This statement is without support of any evidence and is contrary to the express testimony of Raymond Demski to the effect that a standing vote for the dissolution of the E. B. A. was carried by a majority (R. 394).

This meeting also instructed the treasurer of the E. B. A. to retain its funds "until the men find out which way they want to go" (R. 394). Leo Rounds, a temporary chairman of the meeting, had been instructed "to decide what the men really wanted" (R. 307).

Following the meeting, Rounds and Breen decided to form a new association, having gotten the idea "from hearing the fellows talk" (R. 307-308). Breen and Rounds, together with Martin Samp, an office employee, circulated a blank paper among the employees "to see how many members we could get" (R. 175-178, 308).

While there is testimony to the effect that some of the foremen saw Breen and others contact the employees in connection with this campaign, there is no evidence in the record to the effect that they knew what was being done or that these contacts had any relation to the organization of a new association.

The only one in an executive or supervisory capacity who knew anything at all about what was going on was Arthur Hirsch, plant superintendent. It appears that all that Hirsch knew was that Breen was active in organizing a new association. Hirsch testified that previous to May 27th he knew that the men were organizing a union (R. 492-

497), but when it was that he learned this fact does not appear in the record.

The court below, in its opinion, stated "there is testimony that representatives of the management participated in the solicitation. Breen testified that he had told Arthur Hirsch, plant superintendent, of the organization activities" (R. 628).

The only testimony to the effect that any representative of the management had participated in the solicitation was the testimony of the discharged employee, John Froelich, that on May 24th Hirsch had told him: "Sidney (Sidney Greenebaum, an officer of petitioner) says we all better sign up or we will be without work. If we don't sign up some of the others will be crawling in here. * * * You know it would be nice if we all was signed up in the organization" and that Hirsch had also stated "Sidney don't want outsiders to get in the plant because they are forming a union of their own" (R. 64, 69-70, 97-98).

This testimony of Froelich was specifically denied by Hirsch, who testified that he at no time had any conversation with Froelich concerning the Association (R. 489). Out of the entire plant of over 600 employees, Froelich was the only witness who testified that Hirsch had in any way done anything to encourage membership in the new Association, and Froelich's testimony showed no act on the part of Hirsch in respect to any employee other than Froelich.

While the employees were being solicited for membership in the new Association, Breen circulated notices of a meeting for the election of officers. This meeting was held on the night of May 21st. At this meeting a draft of the constitution and by-laws which had previously been prepared was submitted and adopted (Int. Exh. 4). The same had been drafted by the attorney for the E. B. A., Mr. Moland (R. 302, 362, 374).

At this meeting three names were put in nomination for each of the officers of the Association, eleven names were put in nomination for members of the executive committee, and a board of five election commissioners was elected.

The actual election was held during the lunch period on May 24, 1937, in the shipping rooms of the Chicago plants (R. 94, 124, 326, 401), which were used without the permission of petitioner (R. 329). The election was conducted secretly, the votes being taken by secret ballot (R. 97). Of the five officers who were elected, Breen and Grabowski had been officers of the E. B. A., and only two of the five members of the executive board had served for, or been active in, the old E. B. A. (R. 330-331, 562).

Raymond Demski, who was elected president of the new Association, never knew any officer of petitioner (R. 396); never had been active in the E. B. A. while he was a member of it (R. 393); had no intention of running for the office when his name was put in nomination (R. 399); and, did not campaign for the office (R. 401).

On June 25, 1937, the funds of the E. B. A., amounting to $1233.66, were turned over to the new Association (Int. Exh. 4).

The Contract.

Before work on the following morning, the newly elected officers and members of the executive committee met, and after Demski had been introduced to them he was told by Breen: "Well, now, this is all in your hands, I am through. You are president and under the constitution you have complete charge of this gathering." In the course of the discussion that ensued, Mr. Radtke, one of the members of the executive committee, suggested that a contract should be drawn up and presented to the company (R. 403).

A discussion followed as to what should be incorporated in the contract, and different points of view were advanced. Among other suggestions made was the suggestion that the contract provide for a closed shop (R. 403).

At this meeting a skeleton of the proposed contract to be demanded of the petitioner was agreed upon and given to Breen, with instructions to call Mr. Moland and have him draw a contract in accordance with the skeleton (R. 403, 404).

After working hours on the following day, May 26th, Moland brought the draft of the contract and met with the officers and executive committee of the Association. The contract was thoroughly discussed, objections were raised here and there, and all difficulties were ironed out, and the group then went to the offices of petitioner and met with its representatives (R. 404).

According to Demski, the conference lasted about one and one-half or two hours, and was devoted largely to a discussion on the closed-shop and seniority provisions (R. 404-405). Concerning the discussion on the closed-shop clause, Demski testified:

> "There was a heated discussion over that particular clause for an hour and there was so much said about it and there were so many different versions that I gathered I didn't know what they had said about it. I remember particularly that Mr. Greenebaum was against that part and we stood on our demands. We demanded that anybody that was not signed up by tomorrow morning when we started to work had to leave" (R. 435-436).

The contract demanded by the Association and signed by its representatives was left with petitioner, which advised that it would think over the closed-shop clause (R. 405).

Around 8:00 A. M. on the following morning, Demski was called to Mr. Greenebaum's office, and was there told by him that petitioner had agreed to the terms of the contract which the Association had demanded, and was handed the contract signed by petitioner (R. 411-412).

The contract provided for (1) recognition of the Association as bargaining agent, (2) seniority rules, (3) machinery for adjustment of grievances, (4) a 5% wage increase, (5) a closed shop, and (6) check-off. By the terms of the contract, an employee was given three days "after the date of his employment" to apply for membership in the Association (Resp. Exh. 5) (R. 541-546).

The Discharges of Wojdyla, Zych, and Froelich.

John Froelich, Jr., Cyril Wojdyla, and Andrew Zych had been solicited for membership in the Association on numerous occasions prior to the execution and delivery of the closed-shop contract (R. 55, 58, 59, 61, 71, 177, 186, 237). By May 25, 1937, all the employees had joined with the exception only of Wojdyla, Zych, and Froelich (R. 437); and, at the time that the contract was signed by the Association (May 26th), and by petitioner (May 27th), these three were still the only employees who had not joined the Association (R. 437).

The court below, in its opinion, stated that whether Wojdyla, Zych, and Froelich were discharged "after the signing of the contract by respondent cannot be determined from the record" (R. 630). However, the court below apparently overlooked entirely the testimony of Demski, in which he definitely established the fact that these men were discharged after petitioner had signed and delivered the contract to him (R. 412-413).

After Demski received the signed contract from petitioner, he saw Breen, who told him that Wojdyla, Zych, and

Froelich had not yet signed (R. 412). Thereupon, Demski and Breen went to see Wojdyla and Zych, and Breen went to see Froelich (R. 385, 386, 413-415). Each of these men, although advised of the closed-shop contract, unconditionally refused to become members of the Association (R. 71, 186, 237, 385, 386, 413-415). The superintendent, Hirsch, was present at the time Breen had the discussion with Froelich (R. 488-489).

Breen secured the checks of Froelich and Wojdyla from petitioner's office, and Demski offered to secure Zych's check for him, but Zych left the plant without waiting for it (R. 73, 189, 190, 239, 385, 386).

REASONS FOR GRANTING THE WRIT.

I.

The court below erred in enforcing the order of the Board, as modified, for the reason that there was no substantial evidence that petitioner had committed any unfair labor practice, and the decision of the court below (a) does not follow the applicable decisions of this Court which require the Board's order to be supported by substantial evidence, and (b) is in conflict with other decisions of the court below and other Circuit Courts of Appeal dealing with substantially the same material facts.

The evidential facts brought out at the hearing have been set forth *supra*, pp. 7-15. The court below apparently supports its decision on the basis of findings that petitioner (a) advised the formation of a new association, (b) allowed the solicitation of members during working hours, (c) participated in the solicitation, (d) permitted use of the shipping rooms for the election on May 24th, (e) executed a contract demanded by the Association shortly

after it was presented, and (f) discharged Wojdyla, Zych and Froelich because of their refusal to join the Association.

(a) No evidence that petitioner advised formation of a new union.

In its opinion, the court below stated that an officer of petitioner (Mr. Friend) summoned Breen and Nunsek to his office and advised them "that the company could no longer continue its contributions to the Benefit Association and that the employees 'would have to form a new' organization and 'quit the old one'" (R. 627). The court below apparently so held on the basis of the following portion of Breen's testimony concerning the conference with Mr. Friend:

> "A. Well, we got a report from our lawyer that it (the E. B. A.) was against the Wagner Law.
>
> * * * * * *
>
> "Q. What was the nature of the information he gave you that day with reference to that?
>
> "A. Well, I guess the firm told me about it, that we would have to form a new one and quit the old one" (R. 302).

The court below, however, either overlooked, or entirely disregarded, Breen's further testimony on this point as follows:

> "Q. Did anybody connected with the Greenebaum Tanning Company ever ask you to form a union and tell you what they wanted and not to have C. I. O. and not to have American Federation of Labor but to have one of your own that you could run? Did anybody ever tell you anything like that?
>
> "A. Never.
>
> "Q. And when they advised you that the old association could not be continued was it because

they said that they could not any longer aid any organization of employees under the Wagner Act?

"A. They could not match our nickel.

"Q. They couldn't give you any more support?

"A. That is right.

"Q. Did they then say to you that it was immaterial to them whether you affiliated with any labor organization or whether you organized independently, that it meant nothing to them one way or the other, did they say that to you?

"A. They told me they would recognize fifty-one per cent no matter who has got it" (R. 381).

We respectfully submit that Breen's testimony should have been considered in its entirety and, when so considered, does not constitute evidence,—certainly not *substantial* evidence—that petitioner advised the formation of a new union.

The record in this case is totally devoid of any evidence excepting evidence which shows conclusively that the new Association was organized by the employees, without any encouragement or impetus from petitioner.

(b) Solicitation for members during working hours.

While it is true that Breen and some other individuals, active in the organization of the Association, contacted other employees in the plant during working hours, there is no evidence whatsoever that any permission was sought from, or granted by, petitioner in relation thereto. Moreover, there is no evidence to the effect that anyone identified with petitioner in an executive or administrative capacity even knew of any organizational activity, outside of Hirsch.

While some of the foremen saw Breen and others contact the employees, there is no evidence that they knew what

it was all about, or that they knew that it had any relation to a new organization.

Hirsch saw Breen wandering through the plant "once in a while," but so far as Hirsch knew Breen did not leave his work for any great periods of time (R. 492). Hirsch knew that the employees were organizing a new union (although he did not know it had been organized until May 27th), and that Breen was active therein (R. 488, 493). Hirsch did not stop Breen because "It wasn't my business to interfere with him" (R. 493).

Hirsch explained that he had received no instructions from the office either to let Breen engage in this activity or to stop him from so doing, and never talked to any of petitioner's officers concerning it (R. 493-494).

If a man did not put in his full hours, he did not get paid (R. 492), and even though Breen solicited members on some occasions during working hours, he nevertheless got out a full day's work or made up any work that he missed (R. 313).

Hirsch did not know whether the organization which was being formed was to become affiliated with the C. I. O. or the A. F. of L., or was to be independent and without affiliation (R. 504).

It is important to note in this connection that neither the complaining union nor any other union was denied the right to organize and solicit members in the same manner and with the same freedom as the Association. There is no evidence that petitioner ever limited or restricted either the complaining union or any other union or discriminated against them. The activities of the complaining union were veiled in a cloak of secrecy, and it at no time protested to petitioner concerning any activities of the Association or any of its organizers (R. 207, 216, 277, 278, 296).

Even if the solicitations in the plant during working hours had been carried out with the express knowledge and

consent of petitioner, it is respectfully submitted that it cannot and does not establish any conduct on the part of petitioner inconsistent with "an attitude of neutrality respecting all organizational activity among its employees." *Jefferson Electric Co. vs. N. L. R. B.,* 102 F. 2d 949 (C. C. A. 7), p. 956.

In *Jefferson Electric Co. vs. N. L. R. B., supra,* the court below recognized and followed the cardinal principle that, in the absence of a showing that "privileges" granted one organization were denied another, an employer cannot be found to have dominated, interfered with, or supported the organization.

In the case at bar the court below failed to follow the very principles asserted by it in *Jefferson Electric Co. vs. N. L. R. B., supra,*—principles recognized and followed by the Board itself in a number of decisions and by other Circuit Courts of Appeal.

See *In Re Aeolian-American Corporation,* 8 N. L. R. B. No. 1043; *In Re Cooper, Wells & Co.,* 16 N. L. R. B. No. 6; *In Re National Electric Co.,* 16 N. L. R. B. No. 35; *Ballston-Stillwater Knitting Co. Inc. vs. N. L. R. B.,* 98 F. 2d 758 (C. C. A. 2); *Cupples Company Manufacturers vs. N. L. R. B.,* 106 F. 2d 100 (C. C. A. 8); *L. Greif & Bros. Inc. vs. N. L. R. B.,* 108 F. 2d 551 (C. C. A. 4); *N. L. R. B. vs. Swank Products, Inc.,* 108 F. 2d 872 (C. C. A. 3).

In the case of *In Re Aeolian-American Corporation, supra,* the Board stated the principle as follows:

> "The fact that the respondent permitted solicitation of membership by the Independent on company time would of course be strong proof of domination and interference with that organization if the Amalgamated had been denied similar privileges. However, since members and adherents of the Amalgamated were treated equally and afforded full opportunities in this regard, we cannot see that sponsorship and support of the Independent are shown, within the meaning of the act."

In the case at bar we have two underlying factors, viz. petitioner at no time granted permission to the Association or anyone else to engage in any organizational activity on company time, and there is no evidence whatsoever that petitioner in any way, shape or manner discriminated against any other Association.

(c) Participation by petitioner in solicitations.

Apparently the court below sustained the finding of the Board that petitioner participated in the soliciting of members for the Association on the basis of the testimony of Froelich concerning a talk which he had with the plant superintendent, Hirsch, to which we have alluded in the Statement of Facts, *supra*, p. 15.

This alleged conversation is supposed to have taken place on May 24, 1937 (R. 64). Hirsch specifically denied this testimony and testified that he had no conversation with Froelich at any time concerning the Association (R. 489). Froelich's testimony was uncorroborated. Not only was it uncorroborated, but it is rather significant to note that out of the entire plant of over 600 employees not a single witness, outside of Froelich, testified that Hirsch had ever spoken to anyone in respect to membership in the new Association. Significant also is the fact that, despite the alleged conversation which he claimed he had with Hirsch, *he did not in fact join the Association* (R. 72-73), and all the other employees excepting himself, Wojdyla, and Zych *actually joined.*

In addition to the foregoing facts, the credibility of Froelich as a witness was impeached by Froelich himself. When called as a witness for the Board, Froelich testified on direct examination that when he was solicited for membership by Samp, he was told by Samp "You know, Sidney wants us to get all of the boys in, then Sidney will give us a

raise. If we have all of the boys in it will be so much easier to get one" (R. 62-63). On cross examination, however, Froelich, in direct contradiction to the testimony he had given on direct examination, testified that Samp only said that he *thought* that if everybody joined Sidney Greenebaum *might* give the employees a raise in pay, and that Samp never told him that Sidney Greenebaum had actually said that (R. 106).

In the light of the evasive and contradictory testimony of Froelich, in the light of the fact that he was the only individual out of over 600 employees employed in the plant who testified that Hirsch ever contacted anyone concerning membership in the Association, and in the light of the fact that Froelich never actually joined the Association, we respectfully submit that Froelich's testimony concerning the alleged conversation with Hirsch cannot be deemed substantial evidence of solicitation by petitioner, when taken in connection with the express denial of Hirsch.

We respectfully submit that this testimony of Froelich does not constitute "substantial evidence" within the rule laid down by this court in *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197, that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (p. 229).

See also *N. L. R. B. vs. Thompson Products, Inc.*, 99 F. 2d 13, 15 (C. C. A. 6); *N. L. R. B. vs. Sands Manufacturing Co.*, 306 U. S. 332; *Peninsular & Occidental S. S. Co. vs. N. L. R. B.*, 98 F. 2d 411 (C. C. A. 5); *Ballston-Stillwater Knitting Co. Inc. vs. N. L. R. B.*, 98 F. 2d 758, 760 (C. C. A. 2); *N. L. R. B. vs. Union Pacific Stages, Inc.*, 99 F. 2d 153, 158 (C. C. A. 9); *Jefferson Electric Co. vs. N. L. R. B.*, 102 F. 2d 949 (C. C. A. 7); *Cupples Company Manufacturers vs. N. L. R. B.*, 106 F. 2d 100 (C. C. A. 8).

In any event, we respectfully submit that even if Froelich's testimony concerning the conversation with Hirsch were to be accepted as substantial evidence of that fact, *this evidence can support no ultimate finding that by reason thereof petitioner dominated, interfered with, or supported the Association.*

Be it remembered that even Froelich did not testify that Hirsch or any other executive or supervisor of petitioner had solicited anyone other than himself for membership in the Association. Be it also remembered that Froelich was in no manner nor in any wise influenced by the alleged conversation with Hirsch, and never applied for membership or became a member of the Association (R. 72-73).

Somewhat the same situation was involved in the *Ballston-Stillwater Knitting Co.* case, *supra.* The Circuit Court of Appeals for the Second Circuit disposed of it with the remark: "The Board found that the supervisory employees gave some of the workers to understand that they better sign up with the Association if they wished to keep their jobs. It may be noted, however, that the very few witnesses who testified to such threats were not sufficiently impressed thereby to join the Association" (p. 762).

Even the Board itself has clearly enunciated the proposition that a situation should not be disturbed in the absence of a showing that the action complained about has affected the result.

In the case of *In re LaPlant Choat Manufacturing Co. Inc.,* 15 N. L. R. B. No. 52, the Board stated:

> "Although one foreman may have made one anti-union statement to one employee, such employee testified that it did not deter him from voting for the union so that it is no basis for disturbing the election result 'in view of the isolated nature of this in-

cident *and in the absence of some showing that it affected the result of the election'* " (Italics supplied).

Accordingly, we respectfully submit that, *first,* Froelich's testimony concerning the alleged conversation with Hirsch is not "substantial evidence" to establish the fact of such solicitation, and *second,* that in any event the solicitation of Froelich by Hirsch does not support a finding that petitioner by reason thereof dominated, interfered with, or supported the Association.

Granting, *arguendo,* that Hirsch did in fact suggest that Froelich join the Association, it is our contention that the solicitation of a single employee, who never became a member of the Association, *certainly does not constitute any evidence that the petitioner dominated, interfered with or supported the Association.*

(d) Use of the shipping rooms for the election.

During the lunch period on May 24, 1937, the election of the officers of the Association was held in the shipping rooms of petitioner's Chicago plants (R. 94, 124, 326, 401). It is undisputed, however, that the shipping rooms were used for this purpose without petitioner's permission (R. 329), and there is no evidence whatsoever to the effect that petitioner even knew of the use of its premises for this purpose.

We accordingly respectfully submit that the unilateral action of the Association in holding the election on the premises of the petitioner without petitioner's consent manifestly cannot constitute the basis for a finding that petitioner dominated, interfered with or supported the Association. In this connection, what we have heretofore said with reference to strict neutrality on the part of petitioner is also in point (*supra,* pp. 18-19).

(e) The acceptance by petitioner of the contract demanded by the Association.

In referring to the execution of the contract entered into between petitioner and the Association (Resp. Exh. 5) (R. 541-546), the court below, in its opinion, stated: "But it is clear that respondent did sign the contract on the next day, which was May 27, without any change in the form as drafted by the attorney and approved by the officers of the Association" (R. 630).

The Board argued before the court below that petitioner "speedily" granted a contract "embodying extreme concessions to the Association," and that this constituted evidence of domination, interference and support.

As we heretofore pointed out in our Statement of Facts, *supra* pp. 12-13 the contract was conceived by the officers and executive board of the Association and was in no manner or any wise conceived or inspired by petitioner. There is no evidence whatsoever that petitioner had anything to do with reference to the formulation, provisions, or presentation of the contract, or any evidence to the effect that petitioner knew anything at all about the intention of the Association to demand a contract prior to the time that it was actually presented to it for its acceptance. Demski, the president of the Association, in testifying concerning the meeting had with petitioner's officers at the time the Association's contract was taken up with it, on the afternoon of May 26th, stated:

> "We were in there about an hour and a half or two hours. The reason it took that long, the discussion took an hour for that closed contract, closed shop contract, that article there. The company wasn't in favor of it and we had a little discussion among our members and the company put in their discussion about it and they were not in favor of it and we had an argument about it for an hour and

they finally said if we demanded it why they would let it go at that; and then there was about the seniority, there was a little discussion about a seniority plan" (R. 404-405).

Demski further testified in reference to this discussion on the closed shop clause:

"There was a heated discussion over that particular clause for an hour and there was so much said about it and there were so many different versions that I gathered I didn't know what they had said about it. I remember particularly that Mr. Greenebaum was against that part and we stood on our demands. We demanded that anybody that was not signed up by tomorrow morning when we started to work had to leave" (R. 435-436).

Just before this meeting broke up, the president, secretary, and members of the executive board of the Association signed the contract and left it with petitioner, which advised the representatives of the Association that "in regard to that closed shop clause they will think it over and sign it later on" (R. 405).

The following morning around 8:00 A. M., Demski was called to Mr. Greenebaum's office and was there told by him that petitioner had agreed to the terms of the contract, after which Mr. Greenebaum turned the signed contract over to Demski (R. 411-412).

Prior to the execution of the contract, every eligible employee was already a member of the Association, with the exception only of Cyril Wojdyla, Andrew Zych, and John Froelich, Jr. (R. 437).

Surely the Board should be the last agency to criticize an employer for engaging in collective bargaining, getting down to "brass tacks" and entering into a collective bargaining agreement without "stalling."

It should be remembered in this connection that there was not here involved demands by two competing unions

where an employer rushes to enter into an agreement with one union to avert engaging in collective bargaining with another union. As we pointed out above, the activities of the complaining union were veiled in a cloak of secrecy, and so far as petitioner knew no labor organization other than the Association had any membership in the plant.

The court below, in its opinion, refers to the fact that there "was no testimony that the membership of the Association had authorized the preparation and negotiation of a contract" (R. 629). We respectfully submit that whether the contract was authorized by the membership or not can hardly be material in respect to the conduct of petitioner. Surely petitioner could hardly have been expected to pry into the internal affairs of the Association. Had it done so, we rather suspect that the Board would have advanced the reverse argument that by *so doing* petitioner *interfered* with the Association.

See *N. L. R. B. vs. Sterling Electric Motors,* 109 F. 2d 194 (C. C. A. 9).

(f) The discharges of Wojdyla, Zych, and Froelich.

As we heretofore pointed out in our Statement of Facts, *supra,* pp. 14-15, although Wojdyla, Zych and Froelich had been solicited for membership in the Association on numerous occasions prior to the execution and delivery of the closed shop contract and had refused to join, they were again solicited for membership after the execution and delivery of the closed shop contract (R. 55, 58, 59, 61, 71, 177, 186, 237, 385, 386, 412-415). These three were the only employees who had not joined the Association (R. 437).

Despite the fact that they were definitely advised on May 27th that a contract had been executed between the Association and petitioner with a closed shop provision, they nevertheless refused to join the Association (R. 385,

386, 413-415). By reason of these final refusals to join, the pay checks for Wojdyla and Froelich were procured by Breen from petitioner's office on the strength of the closed shop contract and Zych left the plant without asking, or waiting, for his pay check (R. 73, 189, 190, 385, 386). It is admitted that petitioner ratified the action of the Association in terminating the employment of Wojdyla, Zych and Froelich.

During the course of the negotiations between the Association and petitioner on the afternoon of May 26th, it was made known to petitioner that the Association construed the closed shop clause as giving the Association the right to demand "that anybody that was not signed up by tomorrow morning when we started to work had to leave" (R. 436), and petitioner signed the contract on that basis (R. 385, 408, 434-436).

It will be noted that the employment of Wojdyla, Zych and Froelich was terminated by the initiative and independent action of the officers of the Association and that all that petitioner did was to acquiesce therein. When Demski was asked as to the authority of the Association to get the checks, he stated: "Well, we asked them to join and they told us their answers and we figured well, we wanted them out of there whether Greenebaum liked it or not, we wanted those men out of there" (R. 437).

The court below, in its opinion, stated:

> "Respondent does not contend that the discharge of the employees was justified under its closed shop contract and in its answer to the Board's complaint it stated that the men 'voluntarily quit respondent's employment.' And in its brief filed with the Board respondent urged that Breen's action 'not only lacked the authorization of the respondent but in addition thereto was in direct violation of the agreement'" (R. 630-631).

With all due respect to the court below, we submit that it was mistaken when it stated that petitioner does not contend that the discharge of the employees was justified under the contract. The court below was definitely advised by petitioner in its brief (p. 48) that its "position always has been that, upon the refusal of these employees to become members of the Association, the respondent (petitioner herein) was definitely obligated under its agreement to terminate their employment with the company, upon demand by the Association."

It is true that petitioner in a brief filed by it with the Board stated: "Breen's action (in connection with the discharges) not only lacked authority of the respondent but in addition thereto was in direct violation of the agreement." However, as petitioner pointed out to the court below in the brief filed with it, by this statement petitioner merely attempted to emphasize the point that *Breen* insofar as he himself "discharged" the men did so without authority from petitioner, and that under the closed shop contract the Association merely had the right to demand the discharge of these employees.

As we stated in the brief filed with the court below:

> "* * * it was and is respondent's position that insofar as the officers of the Association discharged any employees without advance notification to the respondent, they did so without any authority, and the respondent at no time delegated to the Association the actual right to discharge. However, the respondent's position also was, and still is, that regardless of whether Breen, or the Association officers, had acted properly in taking it upon themselves to advise these employees that they were discharged, the fact remains that the Association had a perfect right under the contract to demand the discharge of these employees, and the respondent was required to comply with such demand.
>
> "Thus, whether Breen or the Association had the right to discharge, in the first instance, becomes

merely an academic question. What the Association should have done probably was to make the demand upon the company to discharge these employees, without taking it upon themselves to act as the discharging agent" (p. 48).

It is true that petitioner alleged in the answer which it filed with the Board that these men "voluntarily quit" petitioner's employment. We respectfully submit that this allegation was perfectly consistent with the position, which the petitioner has always taken, that it could not, even if it wanted to, have retained these employees in its employment because of the closed shop contract and *the action of the employees* in refusing to join the Association. To all intents and purposes, when Wojdyla, Zych and Froelich refused to join the Association after they had been advised of the closed shop contract they "voluntarily quit the employment" of petitioner.

It is definitely established that under Section 8 (3) of the Act the employer has the right to enter into a closed shop contract with the union "not established, maintained or assisted by any action defined in this Act as an unfair labor practice."

See *Jefferson Electric Co. vs. N. L. R. B.,* 102 F. 2d 949, 955 (C. C. A. 7).

We respectfully submit that whether the termination of the employment of Wojdyla, Zych and Froelich is properly characterized as "voluntary quitting" or as a "discharge" the fact remains that their employment was terminated by the Association and ratified by petitioner on the basis of the provisions of the closed shop contract.

We respectfully submit in this connection that under no view of the facts can it be held that petitioner, by terminating the employment of Wojdyla, Zych and Froelich, dominated or interfered with the Association. As we already pointed out, on May 27, 1937, *every other eligible*

employee had already become a member of the Association. The Association, to all intents and purposes, was either a valid, untainted organization at the time the closed shop contract was entered into, which was prior to the discharge of these three employees, or it must fall because of what happened *prior* thereto. Certainly the discharge, *after* the signing of the closed shop contract, of the only three employees who were not members of the Association, could not and did not "taint" the Association, and could not and did not constitute "domination or interference with" the Association. What we have heretofore stated concerning the immateriality of actions which do not effect a result is particularly applicable here.

Summary.

We respectfully submit, in summary, that the evidence shows conclusively that the Association was a free and independent organization of petitioner's employees, organized by the employees without any aid or support by petitioner and wholly free from any domination and interference on the part of petitioner.

If, as the court below held in the cases of *Jefferson Electric Co. vs. N. L. R. B.,* 102 F. 2d 949 (C. C. A. 7), and *Link-Belt Company vs. N. L. R. B.,* 110 F. 2d 506 (C. C. A. 7), the facts therein established did not support a finding of "domination, interference and support" of the labor organizations there involved, we respectfully submit that the court below should have so held with reference to the facts in the case at bar.

If the Circuit Court of Appeals for the 4th Circuit properly held in *L. Greif & Bros. Inc. vs. N. L. R. B.,* 108 F. 2d 551 (C. C. A. 4), and the Circuit Court of Appeals for the 3rd Circuit properly held in *N. L. R. B. vs. Swank Products, Inc.,* 108 F. 2d 872 (C. C. A. 3), that the facts established

by the evidence in those cases did not support a finding of "domination, interference and support," we respectfully submit that the facts established by the evidence in the case at bar can support no such finding.

Certainly, we submit, in no event was there any basis for the disestablishment order, for, as Judge Treanor pointed out in his dissenting opinion in the *Link-Belt Company* case, *supra*, at p. 516:

> "* * * it follows from the nature and function of an order of disestablishment of a bargaining agent that the policy of the Act will not be effectuated by such an order if the agency disestablished thereby is actually the free choice of a majority of the members of the bargaining unit and is genuinely free to represent the interests of the employees in their relation to the employer. Under such circumstances an order of disestablishment would frustrate, not effectuate, the policy of the act."

We accordingly respectfully submit that the decision of the court below is in conflict with the decisions of this Court in *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197, and *N. L. R. B. vs. Sands Manufacturing Co.*, 306 U. S. 332, the decisions of the court below in *Jefferson Electric Co. vs. N. L. R. B.*, 102 F. 2d 949 (C. C. A. 7), and *Link-Belt Company vs. N. L. R. B.*, 110 F. 2d 506 (C. C. A. 7), and the decisions of other Circuit Courts of Appeal, viz.: *N. L. R. B. vs. Swank Products, Inc.*, 108 F. 2d 872 (C. C. A. 3), *L. Greif & Bros. Inc. vs. N. L. R. B.*, 108 F. 2d 551 (C. C. A. 4); *Cupples Company Manufacturers vs. N. L. R. B.*, 106 F. 2d 100 (C. C. A. 8); *Ballston-Stillwater Knitting Co. Inc. vs. N. L. R. B.*, 95 F. 2d 758 (C. C. A. 2); *N. L. R. B. vs. Sterling Electric Motors*, 109 F. 2d 194 (C. C. A. 9); *N. L. R. B. vs. Thompson Products, Inc.*, 99 F. 2d 13, 15 (C. C. A. 6), and *Peninsular & Occidental S. S. Co. vs. N. L. R. B.*, 98 F. 2d 411 (C. C. A. 5).

We accordingly submit that this conflict concerning this important question of the administration of the Act should be disposed of and settled by this Court.

II.

The court below erred in ordering the reinstatement of Wojdyla, Zych and Froelich for the reason that under the Act, as construed by decisions of other Circuit Courts of Appeal, such order cannot be entered in the absence of a finding that at the time of the order the individuals had not "obtained any other regular and substantially equivalent employment" and said order is in conflict with the decisions of the Circuit Court of Appeals for the 4th Circuit in Mooresville Cotton Mills vs. N.L.R.B., 94 F. 2d 61, 97 F. 2d 959, and the decision of the Circuit Court of Appeals for the 9th Circuit in N.L.R.B. vs. Carlisle Lumber Co., 99 F. 2d 533. *

In ordering petitioner to reinstate Wojdyla, Zych and Froelich, the court below exceeded the authority and jurisdiction vested in it, and in the Board, by the Act. To support such order there had to be a finding by the Board (or at least evidence which would have supported such finding), that subsequent to their respective discharges and up to February 15, 1939 (when the Board entered its order), Wojdyla, Zych and Froelich had not "obtained any other regular and substantially equivalent employment."

This principle has been established by the two decisions of the Circuit Court of Appeals for the 4th Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 94 F. 2d 61, 97 F. 2d 959, and the decision of the Circuit Court of Appeals for the 9th Circuit in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533.

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* See Objections to Entry of Decree (R. 637, 638, 640).

Section 10 (c) of the National Labor Relations Act provides, among other things, that:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring said person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of *employees*, with or without back pay, as will effectuate the policies of this Act" (Italics supplied).

It will be noted, from the foregoing portion of the Act, that the authority of the Board to order reinstatement is limited to reinstatement of *employees*. Section 2 (3) of the Act defines "employee" to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and *who has not obtained any other regular and substantially equivalent employment*" (Italics supplied).

In *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533, *supra*, the Circuit Court of Appeals for the 9th Circuit stated, at page 537:

> "It should be noted that only 'employees' may be reinstated. Section 2 (3) of the Act defines 'employee' to 'include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' Respondent makes several contentions regarding the time when the men are to be considered as employees. I think that since the Act provides that the Board may, 'order * * * reinstatement of employees with or without back pay' *before it could make such an order it would first have to determine whether or not the men were 'employees' at the time of its order. If the*

men were not 'employees' the Board would have no power to order their reinstatement'' (Italics supplied).

In holding as it did, the Circuit Court of Appeals for the 9th Circuit in the *Carlisle Lumber Co.* case followed the decision of the Circuit Court of Appeals for the 4th Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 97 F. 2d 959, *supra.* In that case, the Circuit Court of Appeals for the 4th Circuit, at page 961, stated the principle thus:

> "The question arises in connection with the definition of the term 'employee' set out in Section 2 (3) of the Act and the use of the same term in Section 10 (c) of the Act in describing the power conferred upon the Board to direct an employer who has engaged in unfair labor practice to take such affirmative action as will effectuate the policies of the Act. Section 2 provides that 'when used in this Act * * * the term employee * * * shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.' Section 10 (c) provides that if the Board shall be of the opinion that an employer has engaged in unfair labor practice, the Board shall order him to cease and desist therefrom, 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' Giving the word 'employee' the significance which Congress has said it shall have when used in the Act, it would seem to be manifest that *the power conferred upon the Board to order an offending employer to reinstate employees does not include former workmen who have obtained regular and substantially equivalent employment elsewhere''* (Italics supplied).

In the case at bar no further testimony was taken by the Board after February 24, 1938, when the hearing before the Trial Examiner was concluded (R. 533).

The decision, findings of fact, conclusions of law, and order of the Board were not handed down until February 15, 1939 (R. 589-611), almost a year after the conclusion of the hearing. Cyril Wojdyla, Andrew Zych, and John Froelich were found to have been discharged by the company on May 27, 1937 (R. 607). There was at no time any hearing, after the conclusion of the hearing on February 24, 1938, to ascertain whether or not any or all of said employees had obtained any other regular and substantially equivalent employment up to February 15, 1939, when the Board issued its order.

There being no evidence before the Board on which it could have made a finding that up to February 15, 1939, each or any of said men had not "obtained any other regular and substantially equivalent employment," the Board, of course, could not, and did not, make any such finding. As a matter of fact, it did not even find in its findings and order of February 15, 1939 that *up to the time of the hearing* the said employees had not "obtained any other regular and substantially equivalent employment."

As the Circuit Court of Appeals for the 9th Circuit stated in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533, *supra*, at p. 537, "since the Act provides that the Board may 'order * * * reinstatement of employees with or without back pay' before the court makes such an order it would first have to determine whether or not the men were 'employees' *at the time of its order*" (Italics supplied). Thus there is here presented a direct conflict between the decision and order of the court below and the decisions hereinbefore referred to of the Circuit Courts of Appeal for the 4th and 9th Circuits in respect to this important question of the construction of the National Labor Relations Act.

It is our position that the court below, instead of entering the reinstatement order, should have remanded the case

to the Board for a determination by it of the question of fact as to whether the said three men had obtained "regular and substantially equivalent employment" prior to February 15, 1939, when it made its order.

We respectfully submit that in entering the reinstatement order without a proper determination by the Board that the said men had not obtained "other regular and substantially equivalent employment" prior to February 15, 1939, the court exceeded its authority and jurisdiction, that said order is in conflict with the decisions of the Circuit Courts of Appeal for the 4th and 9th Circuits in *Mooresville Cotton Mills vs. N. L. R. B.*, 94 F. 2d 61, 97 F. 2d 959, and *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533, *supra,* and this conflict presents an important question concerning the administration of the Act which should be settled by this Court.

III.

The court below erred in ordering the payment of back pay to Wojdyla, Zych and Froelich, inasmuch as there were no findings or evidence upon which a reinstatement order could be based, and said decision is in conflict with the decision of the Circuit Court of Appeals for the 9th Circuit in N.L.R.B. vs. Carlisle Lumber Co., 99 F. 2d 533. *

If the court below had no authority, for the reasons hereinabove set forth, to order the company to offer to reinstate the three men, it must necessarily follow that the court below likewise had no authority to order the company to make them whole for any loss of pay. The Act, insofar as it authorizes an order for the payment of back

* See Objections to Entry of Decree (R. 638, 640).

pay, limits the payment of back pay to individuals found to be *employees* within the meaning of the Act, and *who are entitled to reinstatement* as such.

In this regard, Section 10 (c) of the Act specifically provides that the Board may order "*reinstatement* of employees with or without back pay" (Italics supplied).

This point was specifically raised and decided by the Circuit Court of Appeals for the 9th Circuit in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533, *supra.* In said case, the Circuit Court of Appeals for the 9th Circuit, in dealing with this question, stated at p. 537:

> "While the Act permits the Board to reinstate with or without back pay, it does not, I think, permit award of back pay without reinstatement, because the back pay provision is connected with and dependent upon the reinstatement provision.
>
> * * * * * *
>
> "The only apparent basis for construction, which would permit 'back pay' without reinstatement is by considering that such power arises from the Board's power to order a person guilty of unfair labor practices 'to take such affirmative action * * * as will effectuate the policies of this Act.' Independently of the words omitted from that quotation which are: 'including reinstatement of employees with or without back pay,' I believe that since 'reinstatement' and 'back pay' were singled out for special treatment, it was intended that the general words were to be limited thereby."

Thus, under this decision of the Circuit Court of Appeals for the 9th Circuit, the court below could not have ordered, as it did, the payment of "back pay" in the absence of a proper finding that the men were still "employees" within the meaning of the Act on February 15, 1939, and as such could demand "reinstatement." As pointed out above, the men were not "employees" within the meaning of the Act, and were not entitled to be rein-

stated, unless they had not obtained "regular and substantially equivalent employment" up to February 15, 1939.

We accordingly respectfully submit that this conflict with the decision of the Circuit Court of Appeals for the 9th Circuit in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. 2d 533, *supra,* presents an important question concerning the administration of the Act and, inasmuch it has not been settled by this Court, should be settled.

IV.

The court below erred when it sustained the order of the Board requiring petitioner to reimburse fiscal agencies of work-relief projects for payments made by them to Wojdyla, Zych and Froelich for services actually performed by them on so-called work-relief projects. Said order was beyond the Board's jurisdiction, or, at least, an abuse of its discretion, punitive in character and deprives petitioner of its property without due process of law, and is in conflict with the decision of the Circuit Court of Appeals for the 2d Circuit in N.L.R.B. vs. Leviton Manufacturing Co. Inc. (decided April 29, 1940), ____ F. 2d ____, the decision of the Circuit Court of Appeals for the 5th Circuit in N.L.R.B. vs. Whittier Mills Co. (decided May 2, 1940), ____ F. 2d ____, and the decision of the Circuit Court of Appeals for the 9th Circuit in N.L.R.B. vs. Tovrea Packing Co. (decided April 30, 1940), ____ F. 2d ____.*

It is our contention that the Board was without any authority, or jurisdiction, to order petitioner to reimburse

* See Objections to Entry of Decree (R. 640-641).

any governmental agency for any money paid by it for "work performed" for it. In this contention, we are supported by the decision of the Circuit Court of Appeals for the 2nd Circuit in *N. L. R. B. vs. Leviton Manufacturing Co. Inc.* (decided April 29, 1940), ... F. 2d ....., the decision of the Circuit Court of Appeals for the 5th Circuit in *N. L. R. B. vs. Whittier Mills Co.* (decided May 2, 1940), ... F. 2d ....., and the decision of the Circuit Court of Appeals for the 9th Circuit in *N. L. R. B. vs. Tovrea Packing Co.* (decided April 30, 1940) ..... F. 2d .....

In dealing with identically the same type of order as that entered by the Board in the case at bar and enforced by the court below by its decree, the Circuit Court of Appeals for the 2nd Circuit in *N. L. R. B. vs. Leviton Manufacturing Co. Inc., supra,* stated (p. .....):

> "The Board itself has always deducted from the wages to be recovered what the employee may have earned meanwhile, and it is impossible to see how it could have done less, whatever may be proper as to what he could have earned by reasonable efforts, but did not. His receipts may be of three kinds: wages from a private employer; wages from a public agency; alms or a dole. As to the first, the Board has never suggested that the employer must pay to another private employer what that employer paid to the employee, and obviously, that would be absurd. Since the order speaks of 'monies received * * * for work performed,' we need not consider alms, or a dole. 'Monies received * * * for work performed' may be no more than a fair return for services rendered, or they might have been deliberately made higher, the margin being doled; and the record at bar does not contain any evidence on the point. At most, any such provision would have to be confined to such a margin; we do not suggest that even then it would be valid.
>
> "However, the whole administration of 'work-relief' was conceived in a spirit exactly the opposite of charity; the very purpose of it was that the em-

> ployees should understand themselves not to be the objects of charity, but to be performing work of a value equal to what they received. As the case stands, therefore, there is no more reason why the company should be compelled under the guise of restitution, to subvene the public enterprises on which Levine worked, than if these had been the ventures of a private capitalist. We must assume that he gave as much as he got, and the order *pro tanto* transferred the burden of the public improvement from the public, which presumably is to profit by it, to the company which will do so only as a member of the public. There could be no clearer instance of a punitive measure than that. There should therefore be deleted from Article II (e) of the order all that part beginning with the words, 'deducting, however, from the amount,' etc."

This precise question, i.e., regarding the validity of an order of the Board requiring an employer to reimburse governmental agencies for wages paid discharged employees on work-relief projects, is now before this court in *Republic Steel Corporation, petitioner, vs. N. L. R. B. et al* (C. C. A. 3), 107 F. 2d 472. Certiorari granted May 20, 1940, No. 707, this Term.

V.

The court below, and the Board, erred in not limiting the scope of the order to the employees employed by petitioner in its Chicago plants, for the reason that only the Chicago plants and the employees therein employed were involved in the proceedings. *

By the decree, petitioner is ordered, among other things, to cease and desist from, in any manner dominating or interfering "with the formation or administration of any other labor organization of its employees," discourage

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* See Objections to Entry of Decree (R. 639).

membership in "any other labor organization of its employees," and "in any manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations to bargain collectively * * *" (R. 645-646).

It will be noted that the decree is in no manner nor in any wise limited to the relations between petitioner and its employees in the Chicago plants. It is our contention that the decree should have been so limited.

The complaint issued by the Board against petitioner was limited to the Chicago plants and charged unfair labor practices in respect only to the employees employed in the Chicago plants (R. 7-9).

The Board moreover specifically found that the proceeding related only to petitioner's Chicago plants. It found, in this connection:

> "The respondent (petitioner here) is an Illinois corporation engaged in the tanning of hides and fabrication of finished leather. Its principal office and place of business is located at Chicago, Illinois, and it owns and operates plants in Chicago, Illinois, and in Milwaukee, Wisconsin. The respondent also owns all the stock in J. Greenebaum Tanning Company of Massachusetts, a Massachusetts corporation which acts as a sales agent for the respondent. *This proceeding relates only to the respondent's two plants located in Chicago, Illinois,* * * *" (Italics supplied) (R. 592).

The Board draws its authority to issue orders from Section 10 (c) of the Act where it is provided, among other things:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any *such* unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from *such* unfair labor practice, * * *" (Italics supplied).

We respectfully submit that inasmuch as the unfair labor practices charged related only to the Chicago plants, and inasmuch as the unfair labor practices "found" related only to the Chicago plants, the Board had no power or authority to issue a blanket cease and desist order relating to all of petitioner's plants.

We contend that the petitioner cannot, and should not, be put in jeopardy of contempt in respect to its relations with its employees employed in its Wisconsin plants, unless in an appropriate proceeding before the Board it has also been established that petitioner has interfered with *their* rights in violation of the Act and an enforcing order has been issued in respect thereto.

Petitioner should have the right to the same hearing with respect to its relations to its employees employed in Wisconsin plants, as was accorded to it in respect to the Chicago plants. Similarly, the employees in the Wisconsin plants are entitled to the same right of intervention as the Chicago employees had in this proceeding. These rights would be denied the employer and the Wisconsin employees if their relations with each other could be controlled through the instrumentality of contempt proceedings instituted under the blanket decree of the court below.

We know of no case in which this Court has held that the Board or the court below has the power to issue a blanket order embracing the relations of an employer to all of its employees, where, as here, the employer has numerous plants in various localities, and only one plant or locality is involved in the proceeding.

Obviously, the question of the power of the Board to issue such an order is a question of great importance in the administration of the Act and, inasmuch as it has not

been passed upon by this Court, we respectfully submit, should be settled by this Court.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

JOHN L. McINERNEY,
One N. LaSalle Street, Chicago, Ill.,

LEON B. LAMFROM,
Bankers Building, Milwaukee, Wis.,

EGON W. PECK,
Bankers Building, Milwaukee, Wis.,

Attorneys for Petitioner,
J. Greenebaum Tanning Company.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 *et seq.*) are as follows:

SEC. 1. * * * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C. Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

SEC. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

SEC. 10. • • • • • • •

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testi-

mony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and issue an order dismissing the said complaint.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such tran-

script a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

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No. 152

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

J. GREENEBAUM TANNING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari
To The
United States Circuit Court of Appeals
for the Seventh Circuit

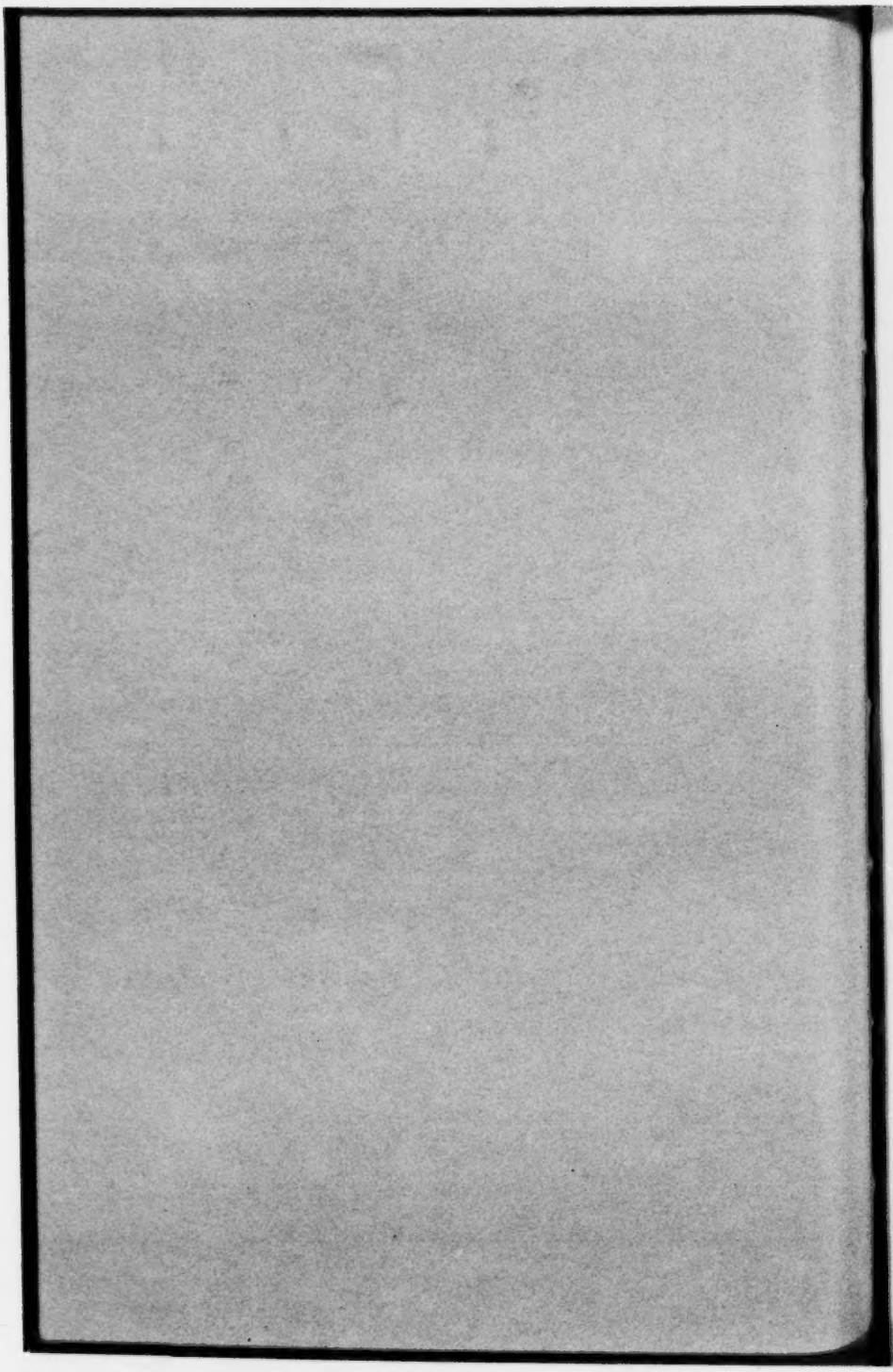
Reply Brief of Petitioner J. Greenebaum Tanning Company.

JOHN L. McINERNEY,
One N. LaSalle Street, Chicago, Ill.,

LEON B. LAMFROM,
Bankers Building, Milwaukee, Wis.,

EGON W. PECK,
Bankers Building, Milwaukee, Wis.,

Attorneys for Petitioner,
J. Greenebaum Tanning Company.



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Sec. 10 (c) 4

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On Petition for a Writ of Certiorari
To The
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Reply Brief of Petitioner J. Greenebaum Tanning Company.

The Board has taken the position that petitioner cannot challenge the validity of the reinstatement order, the back pay order, and the order requiring it to reimburse work-relief projects for payments made to the discharged men for services performed on such projects, on the ground that petitioner did not challenge their validity until after the court below had entered its "Judgment." It is the lim-

ited purpose of this brief to answer this contention. Contentions of the Board in respect to the other questions raised by petitioner are not here considered for the reason that, in our opinion, they either have been adequately covered and fully met in our Petition or need no reply.

Said orders were challenged and duly objected to before the Board and the court below.

The first notice or intimation had by petitioner of the character of the order which the Board might enter against it was contained in the Recommendations of the Trial Examiner in his Intermediate Report (R. 565-573).

In said Intermediate Report, the Trial Examiner recommended, among other things, that petitioner be required to:

> "Reinstate Andrew Zych, Cyril Wojdyla and John Froelich to their former positions, or substantially similar positions, in the plants of the respondent, without prejudice to their seniority or other rights and privileges;
>
> "Make whole the said Andrew Zych, Cyril Wojdyla and John Froelich for any loss of pay they may have suffered by reason of their discharge from employment on May 28, 1937, by payment to them of a sum of money equal to that which they would have normally earned as wages during the period from May 28, 1937, to the date of such offer of reinstatement, less any amounts earned by them during such period" (R. 572).[1]

---

[1] The Trial Examiner made no recommendation that petitioner be required to reimburse work-relief projects for money paid by them to these three men for services rendered to said work-relief projects. Said requirement was included in the order of the Board entered on February 15, 1939, despite the fact that petitioner had no advance notice that the Board intended to go beyond the Trial Examiner's recommendations (R. 571-572, 610).

In accordance with the Rules and Regulations of the Board, petitioner, on June 13, 1938, duly filed its Exceptions to the Intermediate Report of the Trial Examiner with the Board (R. 573-579), and among other things, took the following exception:

> "*Exception No. 25.* With reference to the conclusions and recommendations, all of the conclusions and recommendations are contrary to the evidence and are unfounded in law" (R. 578).

We find no rule or regulation or statutory provision requiring any further or additional action to challenge the validity of the Recommendations of the Trial Examiner, and the Board refers to none.

Despite the Exceptions filed by petitioner to the Intermediate Report of the Trial Examiner, the Board made its Decision, Findings of Fact, Conclusions and Order, and entered the same on February 15, 1939 (R. 589-611).

We find no rule or regulation or statutory provision requiring the taking of any exceptions, or the making of any objections, to the final Decision, Findings of Fact, Conclusions and Order of the Board, and the Board refers to none.

Manifestly, petitioner could not have challenged the order of the Board prior to the making and the entry thereof, and there is no statutory provision, rule or regulation of the Board requiring the taking of exceptions, or the interposition of objections, to its order after its entry.

In the final order of the Board, petitioner, in addition to being ordered to reinstate the three men with back pay, was ordered to reimburse work-relief projects for moneys expended by them for services performed by these men. No recommendation had been made by the Trial Examiner that petitioner be so ordered, and petitioner, accordingly, never had been advised that such an order was in prospect or in issue.

On June 24, 1939, the Board filed its Petition for the Enforcement of its Order of February 15, 1939, in the court below (R. 1-4), and on July 14, 1939, petitioner duly filed its Answer to said Petition for Enforcement (R. 5).

In its said Answer, petitioner alleged, among other things, that said order of the Board "was and is contrary to law, null and of no effect;" that the "actions required of respondent by said order are not ordered in accordance with the law and the facts, and the ordering of such actions is unreasonable, arbitrary and capricious;" and that the "affirmative actions required of respondent by said order are not necessary to, and will not effectuate the National Labor Relations Act, as is required of such an order by Section 10 (c) of said Act" (R. 5).

On March 22, 1940, the court below handed down its Opinion (R. 626-635), and on the same day entered the following order:

> "It is now here ordered by the Court that the order of the National Labor Relations Board entered in this cause on February 15, 1939, be affirmed, as modified by this Court in respect to reimbursements.
>
> "It is further ordered by the Court that said order, as modified, be enforced" (R. 636).

Throughout its Reply Brief and again in its Supplemental Memorandum, the Board refers to this order of March 22, 1940, as the "Judgment" of the court below.

We respectfully submit that it was not the "Judgment" of the court below, and was not considered as such by either the court, petitioner, or by the Board itself. It was, what it purported to be, merely an *order* for judgment.

That it was not considered to be, or treated as, the "Judgment" of the court is borne out by the fact that, subsequent to its entry, the Board itself submitted to the

court below its proposed form of Decree, and thereafter the court below actually entered a "Decree" on April 27, 1940 (R. 645-647).

Manifestly, if the order of March 22, 1940, was the final "Judgment" of the court, there was no necessity for the entry of the Decree on April 27th.

May we call this Court's particular attention to the fact that on April 16, 1940, *prior to the entry of the Decree*, petitioner duly filed, in the court below, its "Objections to Entry of Any Decree at This Time" and "Objections to the Entry of a Decree in the Form Proposed by the National Labor Relations Board" (R. 636-641).

In its said "Objections," it will be noted, petitioner specifically made each and every contention concerning the invalidity of the Board's order which it has raised and asserted in its Petition to this Court for writ of certiorari.

That the court below did not ignore, and did not refuse to consider, petitioner's said "Objections," as the Board would like this Court to believe, is borne out by the fact that on April 27, 1940, prior to its entering its Decree, the court below specifically entered an order overruling petitioner's said "Objections" (R. 644).

The foregoing *resumé* of the procedural steps taken, we respectfully submit, shows that there is no basis whatsoever for the Board's contention that the orders challenged by petitioner before this Court were not properly challenged by it before the Board and the court below.

The Reinstatement Order.

The Board states that there is no decision holding that "where no contention concerning subsequent employment is raised before the Board, the Board must adduce evidence and make specific findings that the men reinstated did not obtain equivalent employment" (Bd. Brief, p. 15).

From the foregoing statement, it is manifest that the Board has failed to appreciate the import of the decision of the Circuit Court of Appeals for the Fourth Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 94 F. (2d) 61, 97 F. (2d) 959, the decision of the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. (2d) 533, and the decision of this Court in *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615.

The Board fails to realize or understand that it has only limited powers; that it has only such *power* as is vested in it by the National Labor Relations Act; and that by said Act it has the *power* to reinstate only "employes" as that term is defined in the Act.

This point is clearly brought out by the Circuit Court of Appeals for the Fourth Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 97 F. (2d) 959, *supra*, at p. 961, as follows:

> "The question arises in connection with the definition of the term 'employee' set out in Section 2 (3) of the Act and the use of the same term in Section 10 (c) of the Act in describing the power conferred upon the Board to direct an employer who has engaged in unfair labor practice to take such affirmative action as will effectuate the policies of the Act. Section 2 provides that 'when used in this Act * * * the term employee * * * shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.' Section 10 (c) provides that if the Board shall be of the opinion that an employer has engaged in unfair labor practice, the Board shall order him to cease and desist therefrom, 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' Giving the

> word 'employee' the significance which Congress has said it shall have when used in the Act, it would seem to be manifest that *the power conferred upon the Board to order an offending employer to reinstate employees does not include former workmen who have obtained regular and substantially equivalent employment elsewhere''* (Italics supplied).

This point is also clearly brought out by the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, *supra,* at p. 537, as follows:

> ''It should be noted that only 'employees' may be reinstated. Section 2 (3) of the Act defines 'employee' to 'include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' Respondent makes several contentions regarding the time when the men are to be considered as employees. I think that since the Act provides that the Board may, 'order * * * reinstatement of employees with or without back pay' *before it could make such an order it would first have to determine whether or not the men were 'employees' at the time of its order. If the men were not 'employees' the Board would have no power to order their reinstatement''* (Italics supplied).

We, accordingly, respectfully submit that if, as the court stated in the *Carlisle* case, *before the Board could make a reinstatement order,* ''it would first have to determine whether or not the men were 'employees' at the time of its order,'' the Board had the positive obligation and burden of establishing the *sine qua non* of the exercise of that power, viz., *that the men were ''employees'' within the meaning of the Act at the time of its order.*

As we stated in our Petition, to support its reinstatement order, ''there had to be a finding by the Board (or

at least evidence which would have supported such finding), that subsequent to their respective discharges and up to February 15, 1939 (when the Board entered its order), Wojdyla, Zych and Froelich had not 'obtained any other regular and substantially equivalent employment' " (Pet. 32).

There was neither a finding to that effect nor evidence which would have supported such a finding if made.

In the instant case, the Board, in opposing our Petition, takes the position that it is not necessary for the Board to make a finding as to whether or not the men were "employes" at the time of its order, unless the issue "of substantially equivalent employment has been raised" (Bd. Brief, p. 16).

Not a word is said by the Board respecting the fact that, in addition to there being no finding that the men were "employees" at the time of its order, there is a total absence of any evidence on their status subsequent to the hearing, which was concluded on February 24, 1938, and prior to the entry of its order on February 15, 1939.

In this connection, the following language of this Court in *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, *supra*, at p. 47, is in point:

> "The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court."

The Board refers to the case of *N. L. R. B. vs. National Motor Bearing Co.*, 105 F. (2d) 652 as supporting its contention that an order for reinstatement need not be supported by a *specific* finding that the men have not "gained substantially equivalent employment" (Bd. Brief pp. 16-17). That case upheld and recognized the very principle we are asserting that "only those who are 'employees' within the Act definition at the time of the making of the Board's order may be ordered reinstated" (p. 662).

It held, it is true, that there need not be a *specific* finding that the men "have not gained substantially equivalent employment." In so holding, however, the court pointedly referred to the fact that the Board had actually made a finding that two of the employees involved in that case had "obtained regular and substantially equivalent employment elsewhere" and then stated:

> "This finding is tantamount to a finding that the other individuals listed had not at the date of the order obtained substantially equivalent employment" (p. 662).

No similar inference can be drawn from the findings made by the Board in the instant case. Not only was there no finding specifically, or by reasonable inference, to the effect that the three men had not "obtained any regular or substantially equivalent employment" prior to the order of the Board of February 15, 1939, but if such finding had been made or inferred it would have been supported by no evidence.[2]

The hearing before the Trial Examiner was concluded on February 24, 1938 (R. 533), and his Intermediate Report was based upon the evidence adduced up to February 24,

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[2] Cf. **Standard Lime & Stone Company vs. N. L. R. B.**, 97 F. (2d) 531 (C. C. A. 4).

1938 (R. 565). Obviously the only evidence that could have been presented, respecting whether or not the three men were still "employes" within the meaning of the Act, was evidence relating to their employment elsewhere since their discharge and *up to the hearing.* That evidence was presented (R. 75-77, 193-194, 239-241). But, as held in the *Carlisle* and *National Motor Bearing* cases, *supra,* only those who are "employes" within the meaning of the Act "at the time of the making of the Board's order" may be ordered reinstated.

In other words, in the period of almost a year between the conclusion of the hearing and the entry of the Board's order, the discharged men may "have obtained other regular and substantially equivalent employment" and, if so, would *not* have been "employes" within the meaning of the Act, at the time of the Board's order. In the absence of evidence that they had not obtained "other regular and substantially equivalent employment" during this long interim, the Board had no power to order their reinstatement. As stated by the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, *supra,* at page 537, "before it (the Board) could make such an order (for reinstatement) it would first have to determine whether or not the men were 'employees' *at the time of its order"* (Italics supplied).

The Back Pay Order.

In our Petition we stated that under the decision of the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, the payment of back pay cannot be ordered if reinstatement cannot be ordered (Pet. 36-38).

The Board states that no decision supports this contention (Bd. Brief. p. 17). In the very case of *N. L. R. B.*

vs. National Motor Bearing Co., 105 F. (2d) 652, referred to by the Board and relied upon by it in its Brief, the Circuit Court of Appeals for the Ninth Circuit expressly held, at p. 662, as follows:

> "We grant enforcement of the reinstatement and back pay orders as to 54 of the listed employees. These provisions of the order will not be enforced, however, as to Joseph Paul Kreig and Fred G. Turner, who have been found to have obtained substantially equivalent employment prior to the making of the order of the Board. We do not believe that we may, as urged by the Board, enforce only the back pay provision of the order as to these individuals, since the provisions as to reinstatement and back pay are, as framed, inseparable. *N. L. R. B. vs. Carlisle Lumber Co., supra,* p. 543."

The Board goes on to state that the language in the *Carlisle* case, *supra,* sustaining petitioner's contention was merely dictum (Bd. Brief 17). The court in the *National Motor Bearing Co.* case, *supra,* did not so regard it, and even if the holding was dictum in the *Carlisle* case, it was definitely involved, considered and decided against the Board in the *National Motor Bearing Co.* case.

The "Work-Relief" Order.

As we stated in our Petition, it was held in *N. L. R. B. vs. Leviton Mfg. Co.,* 111 F. (2d) 619 (C. C. A. 2d), and in *N. L. R. B. vs. Tovrea Packing Co.,* 111 F. (2d) 626 (C. C. A. 9th) that the Board had no power to order an employer to reimburse work-relief projects for moneys paid for work performed, and this Court granted certiorari in respect to this question in *Republic Steel Corp. vs. N. L. R. B.* No. 14, this Term.[3]

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[3] Since the filing of our Petition, it has been held in the following additional cases that the Board had no power to order an employer to reimburse work-relief projects for moneys paid for work performed for them;

The Board does not take issue with our contention other than to assert that the "work-relief" provision of the Board's order was not challenged below.

As we have already pointed out, the Trial Examiner made no recommendation whatsoever in his Intermediate Report that petitioner be ordered to reimburse work-relief projects for any payments made by them to the discharged men for work performed by them on said projects (pp. 2-3). Said provision was inserted by the Board in its order of February 15, 1939, without any notice whatever to the petitioner of its intention so to do.

As we have also pointed out, the validity of the order was challenged in petitioner's Answer to the Board's Petition for an Enforcement Order; and in the detailed "Objections" filed by petitioner all the contentions now asserted here were asserted before the court below prior to the entry of the Decree (pp. 4-5).

As we have also pointed out, these "Objections" were not ignored by the court below, and it entered its Decree only after it had expressly overruled the said "Objections" (p. 5). Thus, the court below, prior to the entry of its Decree, had before it all of the contentions here urged by petitioner. If those contentions were not considered on their merits by the court below, as claimed by the Board, it had the opportunity and obligation so to do.

In its Supplemental Memorandum, the Board points out that the court below, in *Stewart Die Casting Corp. vs. N. L.*

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(3) **Continued—**
Phelps Dodge Corp. vs. N. L. R. B. ..... F. (2d) ....., (C. C. A. 2d) July 11, 1940; **New York Handkerchief Manufacturing Co. vs. N. L. R. B.** ..... F. (2d) ....., (C. C. A. 7th) July 11, 1940; **Stewart Die Casting Corp. vs. N. L. R. B.** ..... F. (2d) ....., (C. C. A. 7th) July 3, 1940; **M. H. Ritzwoller vs. N. L. R. B.** ..... (F. 2d) ....., (C. C. A. 7th) decision on rehearing July 16, 1940.

R. B. (decided July 3, 1940) and in *M. H. Ritzwoller Co. vs. N. L. R. B.* (decision on rehearing July 16, 1940) considered the validity of the "work relief" provision and decided the same against the Board. The Board then asserts that this supports its contention that petitioner's "Objections" were not considered by the court upon their merits (Sup. Mem. 4).

The Board, however, apparently has overlooked the fact that only one of the Judges on the panel that decided the *Stewart Die Casting Corp.* case was on the panel which decided the instant case.[4]

The Board, likewise, has overlooked the fact that at the time that we contended that the "work-relief" provision of the Order was invalid there was no existing decision to support our contention while, on the other hand, when the question was considered in the *Stewart Die Casting Corp.* case, the court had its attention drawn to the fact that said provision had been held invalid by the Circuit Courts of Appeal in the 2d and 9th Circuits in the *Leviton Mfg. Co.* and *Tovrea Packing Co.* cases, *supra.*[5]

Significant in this connection, as showing why the court below decided as it did in the *Stewart Die Casting Corp.* case, *supra,* is the following language in that case:

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[4] The opinion in the **Stewart Die Casting Corp.** case was written by Judge Major who was not on the panel which decided the instant case, and the opinion in the instant case was written by Judge Treanor, who was not on the panel in the **Stewart Die Casting Corp.** case.

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[5] The Decree in the instant case was entered on April 27, 1940. The **Leviton Mfg. Co** and **Tovrea Packing Co.** cases were decided April 29th and April 30th, 1940, respectively.

> "On the other hand, we have a contrary holding in *Labor Board vs. Leviton Mfg. Co.* (2d Cir. not reported), decided April 29, 1940, and *Labor Board vs. Tovrea Packing Co.* (9th Cir. not reported), decided April 30, 1940. We are impressed with the reasoning employed and conclusion reached in these cases that the Board is without power to decree such a requirement."

In its Supplemental Memorandum the Board asserts that the court referred to the conflicting decisions in other circuits upon the question but did not mention its own decision in the instant case, and then asserts that the court below thus "strongly indicated" (in the *Stewart Die Casting Corp.* case) that it did not regard the decision in the instant case as an adjudication upon the question. It was only natural that the court below in its decision in the *Stewart Die Casting Corp.* case did not refer to its decision in the instant case, because nowhere in its decision in the instant case does it appear that the Board had ordered petitioner to make payments to work-relief projects.[6]

On page 3 of the Board's Supplemental Memorandum appears the text of the Court's opinion in full in the *M. H. Ritzwoller* case. Instead of supporting the Board's contention, it clearly shows that it is without merit because, as pointed out by the Court in its opinion, despite the fact that the invalidity of the provision was not argued by the employer prior to its filing a petition for rehearing, the lower court, nevertheless, in its decision on the rehearing, ordered a further modification of the Board's order to eliminate the "work-relief" provision.

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[6] See decision of the court below in the instant case reported in 110 F. (2d) 984.

Conclusion.

Wherefore it is respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for by petitioner in the Petition heretofore filed herein.

JOHN L. McINERNEY,
One N. LaSalle Street, Chicago, Ill.

LEON B. LAMFROM,
Bankers Building, Milwaukee, Wis.

EGON W. PECK,
Bankers Building, Milwaukee, Wis.

Attorneys for Petitioner,
J. Greenebaum Tanning Company.

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245222—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 152

J. GREENEBAUM TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 626–635) is reported in 110 F. (2d) 984. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 589–611) are reported in 11 N. L. R. B. 300.

JURISDICTION

The decree of the court below (R. 645–647) was entered on April 27, 1940. The petition for writ of certiorari was filed on June 14, 1940. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported a labor organization of its employees in violation of Section 8 (1) and (2) of the Act and discriminatorily discharged certain of its employees in violation of Section 8 (1) and (3) of the Act.

As stated in the Argument (*infra*, pp. 13–14), we do not think the following Questions 2, 3, 4, and 5 are properly presented in this case.

2. Whether, as a prerequisite to directing the reinstatement of employees, the Board was required to introduce evidence and make findings that the employees had not obtained regular and substantially equivalent employment at the time of the reinstatement order, although no contention that the employees had obtained such employment was made before the Board.

3. If the answer to the second question is in the affirmative, the further question arises whether the power of the Board to award back pay is limited to employees whom it validly orders reinstated, with the result that the back-pay provisions of the Board's order must fall with the reinstatement provisions.

4. Whether the Board, upon findings that an employer has engaged in unfair labor practices, may order the employer to cease and desist generally from such practices, or whether the Board must limit the operation of its order to the particular geographic locality in which the unfair labor practices occurred.

5. Whether the Board may require, as affirmative action appropriate to effectuate the policies of the Act, that an employer pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work-relief projects of employees who would have been at work for the employer except for their discharge in violation of the Act, such sums to be excluded from the back pay ordered paid to the employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix to the Petition, except that the quotation of Section 10 (e) (Pet. 47–48) omits the following provision, which is of importance in this case:

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

STATEMENT

Upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, i. e., amended charge (R. 10–11), complaint (R. 7–10, 12), answer (R. 14–17), hearing before a trial examiner, at which the Rockwell-Warsaw Leather Workers Association, a labor organization alleged in the complaint to be company-dominated, intervened (R. 25), intermediate report of the trial examiner (R. 565–573), exceptions thereto by petitioner and the Association (R. 573–579, 581–583), oral argument (R. 584) and the filing of briefs before the Board (R. 592), the Board issued its findings of fact, conclusions of law and order (R. 589–611). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

For several years prior to May 1937, petitioner maintained a plainly company-dominated Employees Benefit Association, which purported to act as the employees' bargaining representative in addition to paying them sick benefits from a fund made up of sums deducted from the employees' wages and equal sums contributed by petitioner (R. 594; 298–303, 367, 368, 374, 376, 380). In April 1937 National Leather Workers Association, Local No. 43, commenced its efforts to organize petitioner's Chicago plants (R. 593; R. 34).

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Shortly after this Court sustained the constitutionality of the National Labor Relations Act on April 12, 1937,[2] Friend, an official of the company, summoned Breen, shop chairman of the Benefit Association, and Nunsek, president of that organization, to his office and told them that the employees "would have to form a new one and quit the old one" (R. 595, 601; R. 300–302, 384–385, 380). The Board found that petitioner gave the Association its initial impetus, while carefully planning to clothe it with an appearance of independence, and that petitioner "played a vital part in guiding the course of its organization through its control of the Benefit Association" (R. 601–602). On May 11, 12, and 13, a day or two (R. 384) after the company's advice that a new organization was necessary, Breen and several helpers distributed leaflets among the employees announcing a mass meeting "Concerning the Wagner Law" and promising free beer and sandwiches to those who attended; these leaflets were openly passed out during working hours and were inserted in the workers' time-card racks on the time clocks (R. 595; R. 173, 312–314, 318, 322).

The meeting was held on the evening of May 13; members of Local 43 who sought peaceably to attend and partake in the discussion were evicted by policemen and some of them were arrested (R. 595;

[2] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

R. 274–275, 284–285).[3] Moland, the attorney for the Benefit Association, and another attorney, addressed the employees, informing them that the Benefit Association was illegal and that the men were free to join any labor organization they chose, but suggesting the procedure for organizing an unaffiliated union (R. 595–596, 602; R. 394, 444, 460, Intervenor Exh. 3).[4] The employees voted that the funds of the Benefit Association be retained by its treasurer pending final disposition, but apparently did not discuss whether a successor organization should be established (R. 596; R. 116–117, 304–305, 138, 168, 174–175, 195, 227). But on May 13, apparently prior to the mass meeting, Breen had ordered from a printer application blanks for membership in the "Rockwell-Warsaw Leather Workers Association," which was not yet in existence (R. 596–597, 603; R. 306, 374, 483–484, 486, Bd. Exh. 8).[5]

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[3] Those excluded were not employees of petitioner (R. 274, 284).

[4] In the proceeding before the Board Moland appeared as counsel for the Association (R. 602; R. 20, 25, 583). The Board regarded Moland's activities, and the fact that it was apparently taken for granted that the Benefit Association's attorney would represent its successor, as significant links in the chain of identity between the Association and its admittedly company-dominated predecessor (R. 602).

[5] According to Breen, the name "Rockwell-Warsaw Leather Workers Association" was decided upon by him and an employee named Rounds some 4 days after the mass meeting and he and Rounds first decided to form the Association after the mass meeting (R. 306–308, 372). However, the order for the applications was received by the printer on

During working hours on the days immediately following the mass meeting Breen, an employee named Rounds, and Timekeeper Samp ranged through the plant soliciting the signatures of employees, first on blank sheets of paper, and later on the application blanks when they arrived from the printer (R. 596–597; R. 55–57, 58–59, 118–119, 176–179, 308). The solicitors suffered no loss of pay for the time thus spent (R. 597; R. 317, 313, 495–496) although the solicitation proceeded openly in the presence of petitioner's foremen (R. 597–598; R. 60–61, 121–122, 181–186, 233–234, 236, 313, 315–317, 329, 338, 367, 492–497, 507–508, 516). Breen attributed his immunity from interference to the fact that his position as shop chairman of the Benefit Association entailed similar privileges and "I was still connected with the old association" (R. 597–598, 602; R. 315, 354).

Members of petitioner's supervisory staff participated in the campaign to establish the Association. Timekeeper Samp, one of the most active organizers, told one employee that petitioner's general manager "wants us to get all the boys in" and promised various employees that petitioner would grant a 5-per cent wage increase to those who joined (R. 596, 598–599, 602; R. 60–63, 176–178, 234–235, 247).[6] Both Samp and an assistant

May 13, apparently prior to the mass meeting (R. 596–597; R. 483–484, 486).

[6] Samp's forecast proved correct: petitioner granted a 5 percent wage increase in a contract between it and the Association executed on May 27 (*infra*, pp. 8–9).

foreman threatened employees with discharge unless they signed Association applications (R. 599; R. 236–237, 249). Superintendent Hirsch quoted the general manager as saying that "we all better sign up or we will be without work" and that he did not "want outsiders to get in the plant" (R. 598–599, 602; R. 64, 69–70, 97–98, 488, 316, 491–497). Some 250 signatures were secured the first day (R. 602; R. 317).

An organizing meeting of the Association was announced for May 21 in printed leaflets distributed during working hours (R. 599; R. 123, 324). At this meeting a constitution and bylaws previously drafted by Moland, the attorney for the Benefit Association, were adopted, and officers were nominated and an election scheduled (R. 599–600; R. 302, 361–362, 374–375, Intervenor Exh. 4). The election was held on May 24 in the plants and the results were posted on the time clock (R. 600; R. 94, 124, 326, 329, 401, 403, 426). The results continued control in the officers of the Benefit Association: Breen became shop chairman and three other employees were retained in the offices corresponding to those they had held in the predecessor organization (R. 600; R. 330, 331, 562).

On May 26 the Association presented, and on the following day petitioner executed, a contract providing for recognition of the Association as the exclusive bargaining representative of the employees, a 5-percent wage increase (as previously promised

by Timekeeper Samp, *supra,* p. 7), a closed shop, the checkoff, and machinery for adjustment of grievances (R. 600; R. 541, 346, 404–405, 408). The Board found that petitioner's alacrity in signing the agreement evinced its "eagerness to establish the Association as representative of its employees on a firm contractual basis" (R. 603). The contract was prepared by Moland; neither the members nor all the officers of the Association authorized its drafting or participated in formulating the terms, yielding, so the Board found, a strong inference that they "were merely puppets" in the hands of petitioner (R. 600–601, 603–604, R. 319–320, 339, 340, 342, 344, 403–404). Subsequently the Association acquiesced in petitioner's institution of a 20-percent wage cut (R. 601; R. 445).

The Board found that the expenses involved in launching and establishing the Association were borne either by petitioner or by the company-dominated Benefit Association (R. 603). Supporting this inference are Breen's unsatisfactory, and sometimes palpably false, explanations as to where the money came from, and the unlikelihood that he could afford to defray them himself, as he testified he did (R. 602–603).[7]

On June 25, without authorization by the employees, the funds of the Benefit Association, in-

[7] Breen testified that he paid for the leaflets announcing the mass meeting of May 13 with money borrowed by him from Timekeeper Samp and that he paid from his own pocket the rental of the meeting hall and, apparently, the cost of the refreshments served at that meeting (R. 595;

cluding those contributed by petitioner, were turned over to the Association (R. 601; Intervenor Exh. 4).

At the start of work on May 27, the day after the Association presented the closed-shop contract to petitioner, Breen and two other Association officers informed Wojdyla, Zych, and Froelich, three employees who had not joined the Association, that they were discharged (R. 604–605; R. 73, 187, 238, 412). This was plainly done with petitioner's sanction and approval (R. 604–606; R. 73–74, 488–489, 188–190, 446, 231, 238–239, 443, 385–386, 502–503).[8]

R. 310–311, 121, 153). Breen also testified that he paid the printing bill for the Association application blanks from his own funds (R. 596–597; R. 309). Breen's testimony concerning payment for the leaflets announcing the Association's first meeting on May 21 is plainly false: his testimony is that payment of the printer's bill was deferred and finally made from the first dues collected by the Association; the printer's records, however, show that payment was made on May 19 and 20, prior to the organizing meeting and before any collection of dues (R. 599; R. 324–325, 485–487). There is no indication that the Association repaid Breen for these relatively large expenditures; the Association kept no financial records for the period prior to June 1 and its secretary did not keep his promise, made on the witness stand, to produce vouchers for expenditures which he asserted were made during May (R. 603; 473).

[8] Under the closed-shop provision of the contract, executed on the day of the discharges, the employees were permitted a 3-day period during which to join the Association and the power of discharge was expressly reserved to petitioner (R. 600; R. 545). Petitioner did not contend before the Board that the discharges were proper under the contract but asserted, on the contrary, that they were accomplished in violation of the contract (R. 605–606; note 8, p. 12, *infra*).

Upon the foregoing evidentiary findings, the Board concluded that petitioner dominated and interfered with the Association and contributed financial and other support to it in violation of Section 8 (1) and (2) of the Act (R. 604, 609), that the contract between petitioner and the Association was illegal and void (R. 604), and that petitioner discriminated against Wojdyla, Zych, and Froelich in violation of Section 8 (1) and (3) of the Act (R. 607, 609). The Board ordered petitioner to cease and desist from these unfair labor practices; to cease giving effect to its contract with the Association; to withdraw recognition from and disestablish the Association; to reimburse all employees who were members of the Association for dues deducted from their wages by petitioner pursuant to the check-off provision of the contract; to offer reinstatement with back pay to the three employees discriminated against; to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the three employees on work relief projects; and to post appropriate notices (R. 609–611).

On June 24, 1939, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 1–4). On March 22, 1940, the court handed down its opinion (R. 626–635) and entered its judgment (R. 636) enforcing the Board's order except for the provision requiring

reimbursement to the employees for Association dues checked off their wages by petitioner. A decree was entered accordingly on April 27, 1940 (R. 645–647).

ARGUMENT

I

Petitioner's contention (Pet. 15–32) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. Compare *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 208. Further, the evidence, summarized in the Statement (*supra*, pp. 4–10), affords full support for the findings attacked by petitioner and for the action of the court below in sustaining them.[9] Petitioner's further conten-

[9] Petitioner asserts (Pet. 28–29) that the court below erred in stating (R. 630–631) that petitioner "does not contend" that the discharges of the three employees were justified under the closed-shop contract between petitioner and the Association (R. 630–631). Petitioner did urge that contention in the court below, but it was not properly before the court because petitioner had not raised it before the Board. That is doubtless what the court below intended to convey; its references (R. 631) to petitioner's answer to the complaint and to its brief before the Board so indicate. In its answer petitioner did not mention the closed-shop contract, but denied that it had discharged the employees and alleged that they had voluntarily quit their employment (R. 16). In its exceptions to the intermediate report, petitioner repeated this defense and added that the Association's threats to have the employees discharged were

tion (Pet. 30–31), that in holding that the Board's findings have the requisite support the decision below is in conflict with many other decisions, including those of the court below, is advanced without discussion of the evidence in those cases; since those decisions turned upon their own particular facts they present no conflict.

II

Petitioner also contends: (a) that the order of the Board to reinstate the three discharged employees is not supported by any finding or evidence that the employees had not obtained other regular and substantially equivalent employment when the Board issued its order, and that the court below should, therefore, have remanded the case to the Board for a determination of this question, instead of enforcing the reinstatement order (Pet. 32–36); (b) that under the Act only employees who are validly

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made in violation of the contract between petitioner and the Association, and that petitioner could not be held responsible for the unauthorized actions of the Association's officers (R. 577). The brief filed with the Board by petitioner did not expand these contentions. Consequently, the statement in petitioner's brief in the court below that petitioner's "position always has been" that the discharges were required by the contract (Pet. 28) was untrue. And since no objection not raised before the Board could be considered by the court below without a showing that the failure to urge such objection was excused because of extraordinary circumstances (Section 10 (e)), the change of position in petitioner's brief below (Pet. 28) could not serve to enlarge the contentions before the court.

directed to be reinstated can be awarded back pay, and that the back-pay order therefore falls with the reinstatement order (Pet. 36–38); and (c) that the cease-and-desist order against petitioner should have been limited in its scope to petitioner's Chicago plants, instead of running against petitioner generally, without geographical limitation (Pet. 40–43). These questions, we submit, are not before the Court. They were not urged before the Board (Section 10 (e) of the Act; compare *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9th), and were not raised in the court below when the validity of the Board's order was at issue.[10]

Further, each of the contentions is devoid of merit and, even if the decision below is taken as passing upon it, presents no question worthy of review.

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[10] Neither in its answer to the petition for enforcement (R. 5), nor in its brief (see note 14, p. 20, *infra*) or oral argument in the court below, did petitioner rely upon any of these contentions. They were first raised after the court had rendered its opinion (R. 626–635) and entered its judgment (R. 636) enforcing the Board's order. Petitioner then filed "Objections to the Entry of any Decree at this Time" (R. 639–641) which contained a variety of contentions, not previously advanced, which went to the validity of the Board's order. The order of the court overruling these "Objections" (R. 644) was entered before the Board could submit an answer to them, and the order specified no ground. It may not be presumed that the court considered upon their merits contentions first raised after judgment and at a time when the validity of the Board's order was no longer in issue before the court (compare note 15, p. 21, *infra*).

(a) Enforcement of the reinstatement order in the absence of a finding or evidence that the discharged employees had not obtained regular and substantially equivalent employment [11] is not in conflict, as petitioner asserts (Pet. 33–34, 36), with *Mooresville Cotton Mills* v. *National Labor Relations Board,* 94 F. (2d) 61, 97 F. (2d) 959 (C. C. A. 4th), and *National Labor Relations Board* v. *Carlisle Lumber Co.,* 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646. In each of those cases the obtaining of substantially equivalent employment was raised before the Board as a ground for denying the usual reinstatement remedy, evidence was adduced relative to that defense, the Board found that the employees in question did not obtain such employment, and the court enforced the order. Neither case held, and there is no decision holding, that where no contention concerning subsequent employment is raised before the Board, the Board must adduce evidence and make specific findings that the men reinstated did not obtain equivalent employment. The statement quoted

[11] Section 10 (c) of the Act authorizes the Board to direct such affirmative relief, "including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 2 (3) of the Act defines "employee" to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

(Pet. 33–34) from the *Carlisle* case, that before the Board could make a reinstatement order "it would first have to determine whether or not the men were 'employees' at the time of its order", has reference to a substantive requirement where the issue of substantially equivalent employment has been raised; it is not intended to prescribe a procedural prerequisite for every reinstatement order. That is plain from the context of the statement and also from the subsequent decision of the Ninth Circuit in *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, squarely rejecting the contention here made by petitioner. The court there said (p. 662):

> We agree that only those who are "employees" within the Act definition at the time of the making of the Board's order may be ordered reinstated. *National Labor Relations Board* v. *Carlisle Lumber Co.*, 9 Cir., 1938, 99 F. 2d 533, 537. But that is not to say that an order to reinstate "employees" unaccompanied by specific finding that they have not gained substantially equivalent employment is for that reason invalid. *National Labor Relations Board* v. *Carlisle Lumber Co.*, supra, 99 F. 2d at page 542. Such finding, though helpful to the court, is not essential to validity of the order.
>
> In the present case the Board has ordered reinstated 56 named individuals who are designated as "employees." Since the Board can only order individuals defined by

> the Act as "employees" to be reinstated, an order directing reinstatement of "employees" must be understood, in the absence of a contrary finding, as applicable only to those who are such within the Act's definition.[12] * * *

(b) Since petitioner's attack on the reinstatement order fails, the question whether under the Act only employees who are validly reinstated can be awarded back pay does not arise in this case. Further, no decision supports petitioner's contention; the quoted (Pet. 37) statement from the opinion of Judge Haney in the *Carlisle* case is but dictum, since, as pointed out *supra*, p. 15, the court in that case enforced the reinstatement and back pay provisions of the Board's order. It was, moreover, but the dictum of a single judge. Judge Stephens, concurring, stated that the question was not before the court and that no opinion concerning it should be expressed (99 F. (2d) at 543); Judge Wilbur concurred in the result only (99 F. (2d) at 544). The holdings on the point are contrary to petitioner's contention. *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4th); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3d), certiorari granted limited to another point, No. 14, this Term.

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[12] Here also the Board referred to the men reinstated as "employees" (R. 608, 610).

(c) The cease and desist order, as issued by the Board, is expressly authorized by the Act; Section 10 (c) directs the Board to issue an order requiring the "person" proceeded against "to cease and desist from such unfair labor practices". The limitation in Section 10 (c) is thus one of person only, not of geography. And in requiring the Board to issue an order directing the offending employer to cease and desist from the unfair labor practices found, Section 10 (c) refers to types of unfair labor practices, that is, the types enumerated in Section 8, not to the particular acts or methods constituting the violations found. *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 660–661 (C. C. A. 9th); cf. *National Labor Relations Board* v. *Pure Oil Co.,* 103 F. (2d) 497 (C. C. A. 5th).

The statutory requirement of a cease and desist order directed to the employer proceeded against cannot be avoided by an asserted prospect (Pet. 42) of future contempt proceedings based upon acts unrelated to the original misconduct, or otherwise forecast by petitioner not to be within the proper scope of the decree. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 552, 567, 568, 571; cf. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 543–544. The cease and desist order in this case is in the form which has been invariably employed by the Board and approved without question by this Court and

by the circuit courts of appeals, including many cases where but one of several plants operated by the same employer was involved, E. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

The point was specifically passed upon in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585. There the Board found violations of Section 8 (2) with respect to labor organizations at two of the company's plants and issued a general order requiring the company to cease and desist from dominating, interfering with, or supporting "any labor organization of its employees" (94 F. (2d) 874). The court disapproved the Board's findings as to one of the unions and set aside the withdrawal of recognition provision as to it, but inforced without modification the general cease and desist order. The court said (p. 869):

> One instance is enough to justify an injunction, which does not specifically comprise both company unions.

III

Finally, petitioner asserts (Pet. 38–40) that the decree below, insofar as it enforces the provision (R. 610) of the Board's order which requires petitioner to pay over to governmental relief agencies sums equal to the amounts disbursed by

those agencies for the employment on work relief projects of the three employees discriminatorily discharged by petitioner, is in conflict with *National Labor Relations Board* v. *Leviton Mfg. Co.*, 111 F. (2d) 619 (C. C. A. 2d), and *National Labor Relations Board* v. *Tovrea Packing Co.*, 111 F. (2d) 626 (C. C. A. 9th).[13] In the cited cases similar work relief agency provisions were disapproved and denied enforcement, and in *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, this Court granted certiorari, limited to the work relief agency question. Here, however, as in the case of the other points considered above, petitioner raised no question concerning the "work relief" provision when the validity of the Board's order was under consideration by the court below, but first advanced the contentions in its "Objections" filed after entry of judgment (R. 640–641).[14] We do not, therefore, consider the decision below to

[13] The assertion that the Circuit Court of Appeals for the Fifth Circuit set aside the "work relief" provision in *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, is error, doubtless inadvertent. No such provision was included in the Board's order in that case.

[14] In the brief filed by petitioner in the court below, petitioner opposed enforcement of the cease and desist provisions of the Board's order on the ground that the Board's findings were not supported by substantial evidence, and, with respect to the affirmative provisions, argued that—

"In any event, even if (contrary to the fact) there had been evidence supporting the Board's ultimate findings that

be an adjudication upon the validity of the "work relief" provision.[15]

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the respondent did violate Sections 8 (2) and 8 (3) of the Act, the order of the Board insofar as it requires (a) the disestablishment of the Association; (b) the reimbursement of employees for dues 'checked off' to the Association; and (c) the posting of the notice in the form ordered by the Board, is nevertheless invalid, improper, and without authority under the Act."

The brief then discussed each of the three affirmative provisions which petitioner was challenging. Brief for Respondent, No. 6998, Oct. Term, 1939, Circuit Court of Appeals for the Seventh Circuit, pp. 51–63.

[15] Prior to their decisions in the *Leviton* and *Tovrea* cases, both the Second and the Ninth Circuits enforced the "work relief" provision in cases where its validity was not challenged. *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2d) (see 12 N. L. R. B., at 175–176); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9th), certiorari denied, No. 853, last Term (see 10 N. L. R. B., at 1297–1298). In the *National Casket* case the court said, "The validity of this provision has not been argued, and we express no opinion on the point" (107 F. (2d) 998). The normal practice of the circuit courts of appeals is to enforce provisions of Board orders which are not challenged, although their validity would be a question of first impression if raised. See e. g., *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. (2d) 588 (C. C. A. 5th), enforcing an order requiring that the employer embody any understanding reached with the union in a signed agreement, if so requested by the union (see 13 N. L. R. B., at 1227).

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

THOMAS E. HARRIS,
Special Attorney.

CHARLES FAHY,
General Counsel,

ROBERT B. WATTS,
Associate General Counsel,

LAURENCE A. KNAPP,
Assistant General Counsel,

MORTIMER B. WOLF,
Attorney,
National Labor Relations Board.

JULY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 152

J. GREENEBAUM TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Government's position (Br. in Opp. 19-21) that the decision below is not an adjudication upon the validity of the "work relief" provision of the Board's order, finds further support in two recent decisions of the court below, the opinions in which were received subsequent to the printing of the brief in opposition. *Stewart Die Casting Corp.* v. *National Labor Relations Board,* decided July 3, 1940; *M. H. Ritzwoller Co.* v. *National Labor Relations Board,* decision upon petition for rehearing, July 16, 1940. In the *Stewart Die Casting* case the company contended that the "work relief" provision was not within the author-

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ity of the Board under the Act;[1] the court discussed the provision at length, concluded that it was not valid, and refused to enforce it. In its discussion the court referred to the conflicting decisions in other circuits upon the question, but did not mention its own decisions in the instant case, in the *M. H. Ritzwoller* case (decided May 8, 1940), or in *National Labor Relations Board* v. *Lightner Publishing Corp.*, decided July 1, 1940, in each of which the "work relief" provision had not been challenged by the company prior to judgment and had been enforced by the court. The court thus strongly indicated that it did not regard any of these decisions as an adjudication upon the question.[2]

In the *M. H. Ritzwoller* case the company filed, prior to the *Stewart Die Casting* decision, a petition for rehearing specifically challenging the "work relief" provision and asserting that the

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[1] Brief for Petitioner, No. 7132, October Term, 1939, Circuit of Appeals for the Seventh Circuit, pp. 67, 72–74.

[2] In the *Stewart Die Casting* case, the court likewise indicated that it did not consider the decisions in *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681 (C. C. A. 1st), and *National Labor Relations Board* v. *Planters Mfg. Co.*, 105 F. (2d) 750 (C. C. A. 4th), as holdings upon the point. It said that in the *Somerset Shoe* case "the provision was approved without discussion and, apparently, without consideration" and that in the *Planters Mfg.* case the same result was reached "also without discussion."

court had erred in enforcing it. We quote the opinion of the court in full:

> On petition for rehearing in the above entitled matter, petitioner raises the question as to the validity of that portion of the Board's order which requires petitioner to pay over "to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects." Nothing was said concerning this requirement either in petitioner's original brief or in the Board's brief. It is mentioned, but not argued in petitioner's reply brief. The requirement is shown in a footnote of the Board's order as found in the Transcript of Record. The question, therefore, was not considered or decided.
>
> We have recently, in *Stewart Die Casting Corporation* v. *National Labor Relations Board,* decided July 3, 1940, held that the Board is without authority to make such requirement. There is no occasion to repeat or further discuss what we said in that case.
>
> In addition to the modification suggested in our original opinion, the Board's order is further modified in conformity with this additional holding, and as so modified its request for enforcement is allowed.

This demonstration that the court did not in the present case rule upon the validity of the "work

relief" provision, likewise supports our position (Br. in Opp. 13–14) that the other "Objections" to the validity of the Board's order which petitioner first raised after judgment, and then only in connection with the form of the decree, were not considered upon their merits by the court below.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

JULY 1940.

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